THE AIRE CENTRE
Advice on Individual Rights in Europe

2ND EDITION

Towards a More Effective National Implementation of the European Convention on Human Rights

Guide to Key Convention Principles and Concepts and Their Use in Domestic Courts

Towards a More Effective National Implementation of the European Convention on Human Rights – a Guide to Key Convention Principles and Concepts and Their Use in Domestic Courts

2ND EDITION

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Introduction

The European Convention on Human Rights (the Convention) was adopted in 1950. The Convention was born of its time, in the immediate aftermath of the Second World War. It draws on the bitter lesson learnt in all wars, and in that war most of all – that human conflict can only be avoided if human relations are based on equality and dignity, and that States can only hope to be stable in the long term if they respect the equality and dignity of their communities and their people.

Over 70 years on, the importance of the fundamental set of rights and freedoms guaranteed by the Convention still holds true. However, in order for the Convention to provide its safeguards to all, consistent implementation is paramount – especially as the State Parties to the Convention have different legal systems and implementation methods. The first route, for all people, to take to enforce their Convention rights is through the national courts. National courts are often better placed to assess whether a violation of a Convention right has occurred – in light of the evidence it hears directly, and its knowledge of the domestic law, and the cultural, and socio-economic contexts of the particular Member State. The role of the European Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation in how to apply and implement the Convention, depending on the circumstances of the case and the specific rights and freedoms engaged.

Achieving a better standard of Convention implementation at national level has been a continued priority and point of debate in recent years. This discussion was first initiated at a conference in Interlaken in 2010, and has been followed by the 2012 Brighton Declaration, the 2015 Brussels Declaration and the 2018 Copenhagen Declaration.

However, the effective national implementation of the Convention depends on a general knowledge and understanding of Convention rights and familiarity with the Court's jurisprudence. National judges are only able to give effect to the protected rights at national level if they are familiar with and understand the case law of the Court. The idea to create this guide on applying Convention case law in domestic proceedings was born out of discussions at one of the Annual Regional Rule of Law Forums, organised by the AIRE Centre and Civil Rights Defenders, where current and former judges from the Strasbourg Court, representatives of the most senior courts and judicial councils from throughout the region of the Western Balkans, Government Agents to the Strasbourg Court, legal experts and representatives of the

NGO community meet yearly. The idea behind the establishment of the Forums was the recognition of the need to encourage and facilitate legal cooperation and dialogue across borders, where best practice and lessons could be shared, something which is both necessary and desirable in order to overcome common challenges. The first edition of this Guide focused on the countries in the Western Balkans, however it has been clear that the publication would be helpful to a wider audience, so in this second edition the scope has widened, whilst still focusing on the relationship between Convention law and domestic law and practice.

The guide has four sections covering (i) a short introduction to and overview of the ECHR, (ii) key concepts of the ECHR, (iii) a look at the system for taking cases to the ECtHR and an application's path through the Strasbourg system, and finally (iv) a more in depth consideration of the principles and guidelines for applying ECtHR case-law in domestic decision-making. It is our hope that the publication will complement other thematic publications on the Articles and case law of the ECHR.

We are delighted to present you with the second edition of this publication, based on discussions with and feedback from judicial training institutes in Europe. We hope you will find this a practical tool, both for members of the judiciary and officials at other authorities.

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List of Acronyms and Abbreviations

BCMS	Bosnian/Croatian/Montenegrin/Serbian
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HUDOC	Official database of the European Court of Human Rights
Human Rights Committee	United Nations Human Rights Committee
ILO	International Labour Organisation
Strasbourg Court	European Court of Human Rights
Venice Commission	European Commission for Democracy through Law

Note: "the Court" with a capital first letter is used to denote the European Court of Human Rights; where a reference to domestic courts is made, "the court" is written with a lower-case first letter.

Chapter 1
Short introduction to and overview of the ECHR

I. Genesis and reform

The European Convention on Human Rights was signed[1] in Rome on 4 November 1950, in the aftermath of WWII, and entered into force on 3 September 1953. It is the first and certainly the most important Convention of the Council of Europe, an international organisation currently consisting of 46 member States (27 of these States are at the time of writing also members of the European Union) that was created with the aim to unify its members after the war. Accordingly, the Convention was conceived as a response to the atrocities committed during WWII; a document providing a much needed framework for the protection of fundamental rights and freedoms on an international level. It has been innovatory in the field of international law, in that it recognises a genuine right of individuals to take legal action at international level when all domestic remedies have failed.[2]

Since its entry into force, several Protocols have been adopted, not all of which have, however, been ratified by all Contracting States. Some of these introduced additional rights, whereas some concerned procedural issues. Two major reforms of the system have been realised, both of which aimed to address the increasing caseload of the Court: (i) adopted in 1994, **Protocol No. 11**, which entered into force 1 November 1998, most notably established a new single Court that replaced the initially formed part-time Court and the European Commission of Human Rights. The Commission's decisions form part of the Court's case law and are still valid today unless subsequent case law has amended their findings; (ii) on 1 June 2014 **Protocol No. 14** entered into force and after being adopted in 2009 as a way to introduce further urgent procedural changes. These pertained more "to the functioning than the structure of the Court"[3] and were aimed at reducing the time spent by the Court on

1 The Convention was initially signed by 12 - out of the 15 in total - States that were members of the Council of Europe at the time. Signature and ratification of the Convention is a prerequisite for joining the Council of Europe; all its current members have signed and ratified it.

2 It should be noted that for many years the right of individual "petition" (with Protocol 11 the term "petition" turned to "application") was optional: the Court's jurisdiction to examine complaints by individuals or non-governmental organisations was subject to the condition that the State concerned had declared that it accepted such jurisdiction. Since Protocol 11, the jurisdiction of the Court, as provided in Article 34 of the Convention, has become mandatory (see Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, para. 85).

3 Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental

unmeritorious or repetitive applications so that it concentrates on the most important cases that require in-depth examination[4,5].

On 1 August 2021 **Protocol No. 15** entered into force. This protocol has, *inter alia*, introduced an explicit reference to the principle of subsidiarity and the doctrine of the margin of appreciation[6] in the preamble to the Convention as well as some changes regarding the admissibility criteria[7]. On 1 August 2018 **Protocol No. 16**, the so-called "Dialogue Protocol"[8], entered into force after it had been ratified by 10 European States. It aims to facilitate the dialogue between the ECtHR and the domestic courts via the medium of advisory opinions[9]. In sum, Protocol No. 16 allows the highest domestic courts to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of Convention rights and freedoms. In April 2019 the first advisory opinion was handed down by the Court following a request from the French Court of Cassation. [10]

It is worth noting here that since 2009, the accession of the European Union ("EU") to the ECHR has been a legal obligation stipulated by EU law.[11] Likewise, Protocol 14 of the ECHR provides the legal basis for the EU to accede to the Convention.[12] The resulting assession will make the EU a Contracting Party to the Convention and make it possible for individuals to apply to the ECtHR for review of

Freedoms, amending the control system of the Convention, para. 35.

4 Ibid.paras. 35-37 and 79.

5 The main changes included the introduction of the single judge formation (Article 27), the expansion of the competences of the Committee of three judges (Article 28), a new admissibility criterion in Article 35(3) b, and the possibility to reach friendly settlements at any stage of the proceedings (Article 39).

6 See Chapter 2.V.

7 Shortening from six to four months the time limit within which an application must be made to the Court, and amending the 'significant disadvantage' admissibility criterion (see Chapter 3.II.i.).

8 Dean Spielmann, International conference "Application of the European Convention on Human Rights and fundamental freedoms on national level and the role of national judges", 24-25 October 2014, Opening remarks.

9 See Chapter 3.II.ii.

10 *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, 10 April 2019, P16-2018-001

11 See: Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon 13 December 2007, (entered into force 1 December 2009). Article 6(2): "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties*".

12 Article 59, paragraph 2 of the Convention as amended by Protocol 14: "*The European Union may accede to this Convention*".

the acts of the EU institutions. The integration of the EU into the protection system of the ECHR poses a number of substantive issues, such as clarifying and demarcating the legal relationship between the fundamental rights enshrined in the European Charter and applied by the Court of Justice of the European Union and those protected and enforced by the Convention. Since 2010, negotiations between the Council of Europe and the EU have been on going. At the time of writing, a recent negotiation meeting discussed various proposals, such as the EU's specific mechanisms of procedure before the ECtHR and the principle of mutual trust between the EU Member States.[13]

II. The nature of the rights guaranteed in the Convention

The Convention, including its Protocols, protects predominantly civil and political rights, placing less emphasis on economic, social or cultural rights[14]. The protection of property, the right to education, and the provision guaranteeing equality between spouses are the few exceptions of such rights protected directly via a relevant provision in the text of the Convention. Nonetheless, the Court has stressed that there is no water-tight division separating the sphere of social and economic rights from the field covered by the Convention, as many of the civil and political rights that it protects do have implications of a social or economic nature (*Airey v. Ireland*[15]).

The Court has thus developed a body of jurisprudence where it has accorded indirect protection to certain social and economic rights; it has done so via the interpretation of various Articles of the Convention and/or the recognition of certain positive obligations of the States. Examples of some aspects of such rights examined by the Court include: access to health care[16], fair working conditions[17], issues related

13 12th Meeting of the Steering Committee for Human Rights Ad Hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights, Meeting Report, (7 December 2021): https://rm.coe.int/cddh-47-1-2021-r12-en/1680a4e547

14 Social and economic rights are mainly protected within the 1961 European Social Charter or the revised 1996 European Social Charter which is meant to gradually replace the 1961 Charter. Compliance with the rights set out in both Charters is subject to a supervisory and not a judiciary mechanism; a quasi-judicial system of collective complaints is, however, in place for the countries that have ratified the 1995 Additional Protocol to the European Social Charter.

15 *Airey v. Ireland*, judgment of 9 October 1979, no. 6289/73, para. 26.

16 See, for example, *Panaitescu v. Romania*, judgment of 10 April 2012, no. 30909/06 (on the basis of Article 2) and *D. v. The United Kingdom*, judgment of 2 May 1997, no. 30240/96 (on the basis of Article 3).

17 See, for example, *Siliadin v. France*, judgment of 26 July 2005, no. 73316/01 and *Chowdury and Others v. Greece*, judgment of 30 March 2017, no. 21884/15 (on the basis of Article 4).

to the right to housing[18], the right to bargain collectively with the employer[19], the protection of social security contributions[20].[21]

Similarly, regarding cultural rights, the Court has gradually dealt with substantive rights falling under this category, covering issues such as artistic expression, access to culture, cultural identity, linguistic rights, education, the protection of cultural and natural heritage, the right to seek historical truth and the right to academic freedom, particularly in light of an increasing number of cases brought before it by individuals or entities belonging to national minorities[22].

Moreover, in the context of environmental issues, the Court has recognised the State's potential responsibility in cases where they have failed to regulate private industry in a manner that secures respect for the right to private life.[23]

18 See, for example, *Connors v. The United Kingdom*, judgment of 27 May 2004, no. 66746/01, paras. 81-95 regarding force evictions (on the basis of Article 8); *Fadeyeva v. Russia*, judgment of 9 June 2005, no. 55723/00, regarding exposure to unhealthy living conditions (on the basis of Article 8); *Cyprus v. Turkey*, [Grand Chamber] judgment of 10 May 2001, no. 25781/94, regarding the rights of displaced peoples (on the basis of Article 1 of Protocol 1); *Moldovan and Others v. Romania (No. 2)*, judgment of 12 July 2005, nos. 41138/98 and 64320/01, in which case the applicants' living conditions and the racial discrimination to which they had been publicly subjected amounted, in the special circumstances of the case, to "degrading treatment" within the meaning of Article 3 (paras. 93-114). The Court also found a violation of Article 8 and of Article 14 taken in conjunction with Articles 6 and 8.

19 See, for example, *Demir and Baykara v. Turkey*, judgment [Grand Chamber] of 12 November 2008, no. 34503/97, paras. 140-154 (light of the "right to form and to join trade unions" set forth in Article 11).

20 See, for example, *Stec and Others v. The United Kingdom*, [Grand Chamber] decision of 6 July 2005, nos. 65731/01 and 65900/01, paras. 49-56, (on the basis of Article 1 of Protocol 1).

21 For an extensive piece of research on the indirect protection of social and economic rights through civil and political rights, see "Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability", International Commission of Jurists, 2008.

22 Research report "Cultural rights in the case-law of the European Court of Human Rights", Research division, Council of Europe/European Court of Human Rights, January 2011 (updated 17 January 2017), retrieved on 17 January 2017 from: http://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf.

23 *Hatton and Others v. the United Kingdom*, [Grand Chamber], judgment of 8 July 2003, no. 36022/97. Further, in the at the time of writing, pending case of Duarte Agostinho and Others v. Portugal and 32 Other States (no. 39371/20), the Court will adjudicate on the alleged non-compliance of 33 Member States with their positive obligations under Article 2 and Article 8, read in the light of the commitments made within the 2015 Paris Agreement on the Climate (COP21).

It should be noted that the protection of these rights and freedoms under the Convention system is meant to provide a minimum standard of protection and cannot be construed as limiting more extensive protection guaranteed by national law or other international agreements (Article 53)[24].

III. Overview of the provisions of the Convention and the Protocols thereto

The Convention consists of Article 1, and Sections I, II, and III. At present, six Protocols are annexed to the main text of the Convention providing for additional rights and freedoms. These are going to be presented along with the rights and freedoms guaranteed in Section I of the Convention; other than that, the present overview follows the order of the provisions in the Convention.

Article 1

Article 1 imposes a general obligation on States to secure the protection of the Convention rights and freedoms to anyone within their jurisdiction. This jurisdiction is primarily territorial: as a rule, the States are liable for events taking place on their territory; the Court has, however, recognised certain exceptional circumstances capable of giving rise to the exercise of jurisdiction by a State outside its own territorial boundaries (see below where Section II of the Convention is discussed, namely the competence *ratione loci* of the Court). A spate of recent decisions and judgments[25] has further examined the exercise of jurisdiction on the basis of "effective control" or "state agent authority and control" as summarised in *Al-Skeini and Others v. the United Kingdom*.[26]

It is to be read along with Article 56, which gives the possibility to a State to declare that the Convention extends to all or any of the territories for whose international relations it is responsible. The primarily territorial nature of the jurisdiction, however, is not to be seen as contradictory to the States' liability for their sovereign acts outside their territory or their obligation to take into consideration certain consequences of actions or decisions taken in their own territory that unfold in the territory of another State (for example, in deportation proceedings consideration must be given to the fact that there is a real risk that an individual will be subjected to prohibited treatment if deported to another State).

24 See Chapter 2.V.iii.

25 *Ukraine v. Russia (re Crimea)*, decision of 16 December 2020, nos. 20958/14 and 38334/18; *Georgia v. Russia (II)*, judgment of 21 January 2021, no. 38263/08; *M.N. and others v. Belgium*, [Grand Chamber] judgment of 5 May 2020, no. 3599/18; *Hanan v. Germany*, [Grand Chamber] judgment of 16 February 2021, no. 4871/16.

26 *Al-Skeini and Others v. the United Kingdom*, [Grand Chamber] judgment of 7 July 2011, no. 55721/07.

Article 1 also provides the legal basis for the recognition of the States' positive obligations[27], and it has played a central role in the evolution of the principle that the rights and freedoms set out in the Convention are practical and effective, not theoretical and illusory[28].

Section I: Rights and freedoms

Section I of the Convention comprises **Articles 2-18**. Articles 2-14 enunciate the rights and freedoms guaranteed by the Convention, whereas Articles 15-18 set out some interpretative means for the understanding of the scope of these rights; further rights and freedoms are included in the annexed Protocols of the Convention.

The rights and freedoms guaranteed in Section I

- Right to life (Article 2)
- Prohibition of torture (Article 3)
- Prohibition of slavery and forced labour (Article 4)
- Right to liberty and security (Article 5)
- Right to a fair trial (Article 6)
- No punishment without law (Article 7)
- Right to respect for private and family life (Article 8)
- Freedom of thought, conscience and religion (Article 9)
- Freedom of expression (Article 10)
- Freedom of assembly and association (Article 11)
- Right to marry (Article 12)
- Right to an effective remedy (Article 13)
- Prohibition of discrimination (Article 14)

Articles 15-18

- Derogation in time of emergency (Article 15)
- Restrictions on political activity of aliens (Article 16)
- Prohibition of abuse of rights (Article 17)
- Limitation on use of restrictions on rights (Article 18)

27 See Chapter 2.VII.

28 See Chapter 2VI.ii.

The substantive rights and freedoms guaranteed in the annexed Protocols

Protocol 1

- Protection of property (Article 1 Protocol 1)
- The right to education (Article 2 Protocol 1)
- The right to free elections (Article 3 Protocol 1)

Protocol 4

- Prohibition of imprisonment for debt (Article 1 Protocol 4)
- Freedom of movement (Article 2 Protocol 4)
- Prohibition of expulsion of nationals (Article 3 Protocol 4)
- Prohibition of collective expulsion of aliens (Article 4 Protocol 4)

Protocol 6

- Abolition of the Death Penalty (Article 1 Protocol 6)
- Death penalty in time of war (Article 2 Protocol 6)
- Prohibition of derogations (Article 3 Protocol 6)
- Prohibition of reservations (Article 4 Protocol 6)

Protocol 7

- Procedural safeguards relating to expulsion of aliens (Article 1 Protocol 7)
- Right of appeal in criminal matters (Article 2 Protocol 7)
- Compensation for wrongful conviction (Article 3 Protocol 7)
- Right not to be tried or punished twice (Article 4 Protocol 7)
- Equality between spouses (Article 5 Protocol 7)

Protocol 12

- General prohibition of discrimination (Article 1 Protocol 12)

Protocol 13

- Abolition of the death penalty in all circumstances (Article 1 Protocol 13)
- Prohibition of derogations (Article 2 Protocol 13)
- Prohibition of reservations (Article 3 Protocol 13)

Section II: The Court

Section II of the Convention comprises **Articles 19-51**[29] which contain provisions regarding the purpose of the Court, its composition and structure, its jurisdiction and competence, its deliberation mechanisms and aspects of the procedure before it. This section is supplemented by the Rules of Court and the Practice Directions that are issued by the President of the Court to provide clarification on aspects of the Court's procedure[30].

- **Article 19** sets out the Court's function, which is to ensure that the Contracting States abide by their obligations under the Convention and its Protocols. It is often invoked to indicate the boundaries of the role of the Court as opposed to the responsibilities of the States (Article 1),[31] and the role of the Committee of Ministers (Article 46)[32].

- **Articles 20 - 31** concern the Court's composition, its supporting staff, and its organisation in different formations (plenary Court[33], single judges, Committees of three judges, Chambers, and Grand Chamber), including the competence of each of these[34].

- **Article 32 - 35** delineate the jurisdiction and competence of the Court as well as criteria regarding the admissibility of an application. The admissibility criteria is further considered in Chapter 3.[35]

Competence ***ratione materiae***: the Court may examine applications regarding rights that are protected by the Convention and its Protocols. If a complaint concerns a situation that falls outside the scope of these rights, the application - in part or in its entirety - will be rejected as incompatible *ratione materiae* with the provisions of the Convention and the Protocols thereto. Also, complaints based on a provision in respect of which the respondent State has made a valid reservation under Article 57 will be rejected as incompatible *ratione materiae* – the validity of a State's reservation is assessed by the Court[36].

29 The following grouping of these Articles serves analytical reasons only.

30 Available at: http://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules#n1347877334990_pointer

31 See Chapter 2.V.ii about the principle of subsidiarity.

32 See Chapter 3.III.ii.&iii.

33 "Plenary Court" means the European Court of Human Rights sitting in plenary session (Rule 1 of the Court).

34 See Chapter 3.II.i.

35 For an outline of the admissibility criteria see Chapter 3.II.i.

36 See the leading judgment *Belilos v. Switzerland*, judgment of 29 April 1988, no. 10328/83, paras. 50-60. For a recent recapitulation and application of the relevant principles see, for example, *Schädler-Eberle v. Liechtenstein*, judgment 18 July 2013, no. 56422/09, paras. 59-93.

Competence ***ratione personae***: the alleged violation of the Convention must have been committed by a Contracting State or be in some way attributable to it. Also, the applicant must have standing according to Article 34 and be a "victim"[37] of the particular violation alleged.

Competence ***ratione loci***: the Court shall only examine applications regarding complaints of actions that took (or will take) place within the jurisdiction of a Contracting State. Generally, two situations give rise to exercise of jurisdiction by a State outside its own territorial boundaries and raise issues of State responsibility under the Convention: (i) circumstances of "State agent authority and control", where the State, through its agents that operate outside its territory, exercises control and authority over an individual, and (ii) "effective control over an area"[38]. These circumstances must be exceptional to justify an extra-territorial jurisdictional link.[39]

Competence ***ratione temporis***: the Court will not examine applications regarding complaints in relation to any act or fact which took place, or any situation which ceased to exist before the date of the entry into force of the Convention with respect to the respondent State (the "critical date"). The Court needs to identify, in each specific case, the exact time of the alleged interference, taking into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated (*Blečić v. Croatia*[40]).

37 For the autonomous concept of "victim" see Chapter 2.VI.i.

38 See *Al-Skeini and Others v. the United Kingdom*, [Grand Chamber] judgment of 7 July 2011, no. 55721/07, paras. 130-150, where the Court examines its previous case-law regarding its jurisdiction under Article 1, clarifies the principles applicable on the matter and exemplifies the above two categories of exceptional circumstances. See also the further development of these principles in *Güzelyurtlu and Others v. Cyprus and Turkey* [Grand Chamber] judgment of 29 January 2019, no. 36925/07 which elaborates the "special features" capable of justifying a jurisdictional link in the context of a State's obligations under Article 2, and the recent application of these principles in *Ukraine v. Russia (re Crimea)*, decision of 16 December 2020, nos. 20958/14 and 38334/18; *Georgia v. Russia (II)*, judgment of 21 January 2021, no. 38263/08; *M.N. and others v. Belgium*, [Grand Chamber] judgment of 5 May 2020, no. 3599/18; *Hanan v. Germany*, [Grand Chamber] judgment of 16 February 2021, no. 4871/16.

39 E.g., in *M.N. and others v. Belgium*, [Grand Chamber] judgment of 5 May 2020, no. 3599/18, para 121, which concerned the rejection of applications for visas at the Belgium embassy in Lebanon, the fact that decisions taken at national level in Belgium had an impact on the situation of persons resident abroad was not sufficient to trigger an extraterritorial jurisdictional link.

40 *Blečić v. Croatia*, [Grand Chamber] judgment of 8 March 2006, no. 59532/00, para. 82.

The Court may have regard to the facts prior to ratification inasmuch as they could be considered to have created a continuous situation extending beyond that date or may be relevant for the understanding of facts occurring after that date (e.g. *Kurić and Others v. Slovenia*[41]). The procedural obligations arising under Articles 2 and 3 in particular have been found to be "detachable" from the substantive aspects of these rights; thus, in cases where deaths or illegal treatment occurred before ratification, the State may have a distinct procedural obligation in relation to these acts (to conduct an effective investigation and institute appropriate proceedings) that arose after the critical date. Accordingly, the Court can assume temporal jurisdiction in such cases.[42]

- **Articles 36 - 40** concern procedural issues related to 3rd party interventions, the Court's power to strike out applications, the examination of the case, friendly settlements, and the public character of the hearings and the documents submitted to the Registrar.

- **Articles 41 - 49** concern remedies for the injured party (just satisfaction - Article 41), the decisional instruments of the Court (decisions, judgments and advisory opinions), including their content and the conditions under which Chambers' judgments become final, and the binding force and execution of final judgments (Article 46). All these issues are examined in Chapter 3.

- **Articles 50 - 51** relate to the Court's expenditure, borne by the Council of Europe, and the privileges and immunities to which the judges are entitled.

Important note: It is evident Section II of the Convention contains Articles concerning the function of the Court and certain procedural issues before it. However, some of these Articles do contain substantive rights that individuals may rely on. For example, the Court has held that under Article 34 the Contracting States have an obligation not to interfere with an individual's effective exercise of the right to submit and pursue a complaint before the Court (*Paladi v. Moldova*[43]). Also, the Court has held that it is competent to examine complaints related to the non-execution of a particular judgment where there are facts that give rise to a fresh violation (e.g. *Emre v. Switzerland (No 2)*[44])[45]. Parties to the proceedings must cooperate with the Court under Article 38 and submit all relevant information in order for the Court to establish the facts of the case. However, where the Court itself has not requested certain information or documents, this will be fatal to any related allegation of a failure of a Respondent State to comply with its Article 34 obligations.[46]

Section III: Miscellaneous provisions

Section III of the Convention comprises **Articles 52-59** which contain miscellaneous provisions. These concern inquiries made by the Secretary General (Article 52), the relation of the Convention with other instruments that provide human rights protection (Article 53)[47], non-interference with the powers of the Committee of Ministers as these are set out by the Statute of the Council of Europe (Article 54), the exclusion of other means of dispute settlement (Article 55), the Convention's territorial application (Article 56)[48], States' reservations in terms of particular provisions (Article 57), the denunciation of the Convention (Article 58), and its signature and ratification (Article 59).

41 See, for example, *Kurić and Others v. Slovenia*, [Grand Chamber] judgment of 26 June 2012, no. 26828/06, para. 240. The Court concluded that, although the erasure had happened before the Convention's entry into force in respect of Slovenia, on that date the applicants were - as they continued to be - affected by the fact that their names were erased from the register.

42 See *Šilih v. Slovenia*, [Grand Chamber] judgment of 9 April 2009, no. 71463/01, paras. 139-167. The case concerned the procedural limb of Article 2 and established its "detachable" character. The Court set two criteria, stating that the Court's temporal jurisdiction will extend only to the procedural acts or omissions in the period subsequent to the critical date and that there must "exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State (paras. 162-163). These criteria were later clarified in the case of *Janowiec and Others v. Russia*, [Grand Chamber] judgment of 21 October 2013, nos. 55508/07 and 29520/09, paras. 140-151.

43 *Paladi v. Moldova*, [Grand Chamber] judgment of 10 March 2009, no. 39806/05, para. 85.

44 *Emre v. Switzerland (No 2)*, judgment of 11 October 2011, no. 5056/10, para. 39, also citing *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No 2)*, [Grand Chamber] judgment of 30 June 2009, no. 32772/02, paras. 66-67.

45 See Chapter 3.III.iii about the role of the Court after deliverance of a final judgment.

46 *Yam v. the United Kingdom*, judgment of 16 January 2020, no. 31295/11, para 81. The case concerned whether the applicant's trial for murder was rendered unfair under Article 6 due the trial judge's decision to hold part of the trial *in camera*. The Court was invited by the applicant to request the *in camera* material from the State authorities, but declined to do so. This was fatal to the applicant's allegation that the State had hindered the applicant's right of individual petition under Article 34.

47 See Chapter 2.V.iii.

48 See above under Article 1 and the competence *ratione loci*.

Chapter 2

Key European Convention concepts and principles

This chapter is dedicated to the key concepts and principles that underpin the Convention and is intended to be used as a practical tool when reading and implementing the jurisprudence of the Court. Some of the key concepts are clear from the text of the Convention; others are not expressly articulated in the text, but have been read into it by the Court when applying the Convention. Whilst some of the concepts may at first glance look familiar, the Strasbourg organs have also ruled that certain terms have an "autonomous" meaning under the Convention. These terms may NOT therefore have the same meaning as they do in national law.

This chapter is divided into 7 sections:

- The Convention's relationship with national and international law
- Autonomous concepts
- Categories of rights
- Positive obligations
- Proportionality
- The balancing of rights
- Prohibition of discrimination

I. THE CONVENTION'S RELATIONSHIP WITH NATIONAL AND INTERNATIONAL LAW

i. Subsidiarity

Protocol 15 has introduced an express reference to the principle of subsidiarity into the Preamble of the Convention[49]. However, even before the entry into force of Protocol 15 it had long been considered as a principle deeply embedded in the Convention and the Court has been referring to it since its early case-law (for the first time in the *Belgian linguistic case*[50]). The principle of subsidiarity embodies the shared responsibility of the States and the Court for realising the effective implementation of the Convention[51]. Accordingly, it has a two-sided nature. On the one hand, the States are responsible for securing the rights and the freedoms guaranteed by the Convention and for providing effective remedies when necessary. This obligation falls on all national authorities, including domestic courts. On the other hand, the Court cannot assume the role of the competent national authorities in doing so and must therefore recognise a margin of appreciation enabling them to choose the appropriate measures. Its obligation is to supervise the conformity of these measures with the requirements of the Convention. As regards the domestic courts' decisions in particular, the Court has repeatedly said that it is not a fourth-instance court and it cannot take the place of the national courts, which are first and foremost responsible to assess the facts of a case and the applicable law; it will only move on to make such an assessment itself when this is required to ensure that the decisions in question are not in themselves in breach of the Convention.

ii. The margin of appreciation

The "margin of appreciation" is a jurisprudential doctrine developed by the European Court of Human Rights. It defines the relationship between a supranational court - the European Court of Human Rights - and national courts. Under the Convention, States are free to adopt whatever means they choose to protect Convention rights, subject to the final supervision of the Convention organs. The Convention does not demand the same standards to be applied uniformly throughout the 46 Member States of the Council of Europe with their widely different social, cultural, economic and legal systems. In this respect, Convention law is very different from European Union law which does demand a very high degree of uniformity. So long as the States have "secured" the protected rights, as required by Article 1, they have a margin of appreciation as to how they do so. Whether this margin is wide or narrow will depend on the right involved and the circumstances of the case. As is the case with the principle of subsidiarity, the doctrine of the margin of appreciation was previously "invisible" but has been expressly introduced into the preamble to the Convention by Protocol 15[52].

iii. Article 53 (Safeguard for existing human rights)

Article 53 is another manifestation of the principle of subsidiarity in that it recognises that States may decide to provide enhanced protection for human rights, with the Convention being the absolute minimum. Additional protection may be afforded either via the domestic legislation or via international agreements to which

49 Protocol 15 was adopted on 24 June 2013 and entered into force on 1 August 2021 following ratification by Italy, the last Member State to do so.

50 *Case relating to certain aspects of the laws on the use of languages in education in Belgium, "Belgian linguistic case"*, judgment of 23 July 1968, nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64.

51 See the 2012 Brighton Declaration.

52 Supra note 51.

each State may choose to be a party, particularly those that are more thematic. Article 53 prohibits an interpretation by the Court of the Convention in a manner which would provide less human rights protection than either (i) the domestic law of the State in question, or (ii) the provisions of any international instrument by which that State is formally bound. The Court has also long referred to other international instruments as an informative aid to interpreting the Convention, irrespective of whether the respondent State is bound by them. Those most frequently referred to include: the Convention on the Rights of the Child; the Council of Europe Convention on Action against Trafficking in Human Beings; the 1951 Refugee Convention; the Convention on the Rights of Persons with Disabilities, EU law, and other United Nations human rights instruments.

iv. The relationship with the Vienna Convention on the Law of Treaties

The role of the Court is set out in Article 19 of the ECHR. Its object and purpose is to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto". Pursuant to Article 32 of the ECHR, the Court has jurisdiction in all matters concerning the interpretation of the ECHR and the protocols in cases which are referred to it. However, this provision provides no guidance on how the Court should conduct these tasks. The Court has consistently held that the ECHR is a part of public international law and thus should be interpreted in accordance with the rules on interpretation in the Vienna Convention on the Law of Treaties (VCLT) rules of interpretation contained in Articles 31-33.[53] According to the VCLT, the provisions of the treaties should be interpreted in "good faith," in accordance with the "ordinary meaning" of the "terms" or text of the treaty, in their "context," and in light of the treaty's "object and purpose". At the same time the Court has emphasised the special character of the ECHR as an instrument for the protection of human rights of individual human beings[54] and as such should be interpreted to make its safeguards practical and effective and in accordance with its object and purpose.[55] The Court clarified the special character of the Convention in *Ireland v. the United Kingdom* by stating that "unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'."[56] The rights and freedoms guaranteed by the ECHR are

53 See, for example, *Hassan v. the United Kingdom*, judgment of 16 September 2014, no. 29750/09, para. 77 and the references cited therein.

54 *Soering v. the United Kingdom*, judgment of 7 July 1989, no. 14038/88, para. 87 .

55 *Golder v. the United Kingdom*, judgment of 21 February 1975, no. 4451/70, para. 35.

56 *Ireland v. the United Kingdom*, judgment of 18 January 1978, no. 5310/71, para. 239.

phrased in a general form. There is thus in some situations a need for concretisation in accordance with Articles 31-33 VCLT.

II. AUTONOMOUS CONCEPTS

The Convention institutions have adopted a particular "Convention meaning" for a number of notions – a meaning which is often different from that found both in national law and in layman's speech. This approach is justified by the need to secure a degree of uniformity of treatment in the contracting parties as well as to ensure that States do not use their own definitions to circumvent the rights and freedoms guaranteed by the Convention. Since its first judgments on the issue of the autonomous meaning of certain notions (*Engel v. Netherlands*[57] and *König v. Germany*[58]), the Court has highlighted on numerous occasions that the definitions under domestic law serve as just a starting point. Hence, when using Convention provisions and case-law, it is important to be familiar with these autonomous concepts and their definitions.

i. Definition of terms used in the Convention text[59]

Torture (Article 3)

In determining whether a particular form of ill-treatment should be classified as torture, consideration must be given to the distinction between this notion and that of inhuman or degrading treatment, also equally prohibited by Article 3. In *Ireland v. the United Kingdom*[60], the Court asserted that with this distinction, the Convention should 'attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering'. Therefore, for ill-treatment to amount to torture it must have two constituent elements. First, it must attain a certain level of intensity, which means that only treatment causing serious and cruel suffering will be considered torture. The severity of the suffering depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc. The second element entails that the ill-treatment needs to be 'deliberate' or inflicted intentionally for a purpose such as obtaining evidence, punishment or intimidation.[61] Thus, for instance, this led the

57 *Engel v. Netherlands*, judgment of 8 June 1976, nos. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, para. 81.

58 *König v. Germany*, judgment of 28 June 1978, no. 6232/73, paras. 88-90.

59 Note that the Articles in parentheses refer to the Article in light of which the respective concept has predominantly been examined by the Court; thus, there is a reference to a particular Article also for concepts that are not included in the text of the Article mentioned (e.g. "civil service" or "moral and physical integrity").

60 *Ireland v. the United Kingdom*, judgment of 18 January 1978, no. 5310/71, para 167.

61 *Ilhan v. Turkey*, [Grand Chamber] judgment of 27 June 2000, no. 22277/93, para. 85.

Court to establish in *Denizci and Others v. Cyprus*[62] that, even though the applicants were subjected to intentionally inflicted inhuman treatment contrary to Article 3, this did not amount to torture precisely because it had not been established that there had been any particular aim underlying the use of force.

An early case in which the Court found that an act of torture did occur was *Aksoy v. Turkey*[63]. In this case, the applicant was subjected to the so-called 'Palestinian hanging' by state agents. He was stripped naked and suspended by his arms tied behind his back, which left him paralysed.

Rape constitutes an especially grave act amounting to torture, particularly when committed by an official of the State.[64]

Torture has also been found in cases of extraordinary rendition, such as *El-Masri v. the Former Yugoslav Republic of Macedonia*,[65] and *Al Nashiri v. Poland*.[66]

As for the severity of suffering, the Court is hesitant to label as torture the suffering which is inflicted only for a short period of heightened tension and emotions.[67] In *Ireland v. the United Kingdom*, it was established that mental suffering may constitute torture provided it is sufficiently serious. In *Gäfgen v. Germany*, the Court reaffirmed that 'a threat of torture can amount to torture' since 'the fear of physical torture may itself constitute mental torture.[68]

The Court revised the applicable standards relative to torture in *Selmouni v. France* and established that an increasingly high standard was required in the field of human rights protection because of which certain ill-treatments that might have not been regarded as torture by the Court, could now be classified as such.[69]

62 *Denizci and Others v. Cyprus*, judgment of 23 May 2001, nos. 25316-25321/94 and 27207/95, para. 384.

63 *Aksoy v. Turkey*, judgment of 18 December 1996, no. 21987/93.

64 *Aydin v. Turkey*, [Grand Chamber] judgment of 25 September 1997 no. 23178/94, paras. 78-88.

65 *El-Masri v. the Former Yugoslav Republic of Macedonia*, [Grand Chamber] judgment of 13 December 2012, no. 39630/09, paras. 205-211.

66 *Al Nashiri v. Poland*, judgment of 24 July 2014, no. 28761/11, paras. 511-516.

67 *Egmez v. Cyprus*, judgment of 21 December 2000, no. 30873/96, para. 78. The Court established that the use of physical force during apprehension of the applicant and transportation to a police station constituted inhuman treatment and not torture.

68 *Gäfgen v. Germany*, [Grand Chamber] judgment of 1 June 2010, no. 22978/05, para. 108

69 *Selmouni v. France*, judgment of 28 July 1999, no. 25803/94 paras. 102-105.

Inhuman treatment (Article 3)

Ill-treatment must attain a 'minimum level of severity' if it is to amount to inhuman treatment contrary to Article 3. The suffering caused must 'go beyond that inevitable element of suffering' that results from a 'given form of legitimate treatment or punishment'.[70] It differs from torture in that it does not need to be intended to cause suffering and there is no need for the suffering to be inflicted for a purpose.[71] Otherwise, the crucial distinction between torture and inhuman treatment lies in the degree of suffering caused. Clearly, less intense suffering is required than in the case of torture. In *V.C. v. Slovakia*,[72] the Court offered some instances of inhuman treatment, namely the suffering resulting from an amputated leg, gunshot wounds, a broken jaw, and other facial injuries. In contrast, in *Bouyid v. Belgium*[73] the threshold for inhuman treatment was not met, the Grand Chamber held that a slap on the face by a policeman that caused 'only minor bodily injuries' and that did not result in 'serious physical or mental suffering' was not inhuman treatment.

A threat of torture, if 'sufficiently real and immediate', may generate enough mental suffering to be inhuman treatment. In *Gäfgen v. Germany*, there was inhuman treatment when the applicant was threatened with 'intolerable pain', that would amount to torture, if he refused to disclose the whereabouts of a young boy whom he had kidnapped.[74]

Article 3 does not prohibit all use of force by the police in dealing with a person on arrest or in detention, but the force used must be proportionate and strictly necessary in the circumstances. In cases where there are complaints about the use of physical force, the applicant must, in principle, first provide reliable medical or other evidence as to the injuries claimed to have been sustained.

Degrading treatment (Article 3)

Treatment is degrading if it 'is such as to arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing them'[75] or in other words if it 'humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable

70 *Kudla v. Poland*, [Grand Chamber) judgment of 26 October 2000, no. 30210/96, para. 92.

71 *Denizci and Others v. Cyprus*, judgment of 23 May 2001, nos. 25316-25321/94 and 27207/95, para 384.

72 *V.C. v. Slovakia*, judgment of 8 November 2011, no. 18968/07, para. 102.

73 *Bouyid v. Belgium*, judgment of 28 September 2015, no. 23380/09, para. 112.

74 Supra note 70.

75 Supra note 75, para 87.

of breaking an individual's moral and physical resistance'.[76] When compared to the inhuman treatment, the degrading treatment puts emphasis on the humiliation or debasement, rather than physical or mental suffering. In recent years, the Court started to emphasise the person's dignity more in cases involving degrading treatment. For instance, in *Bouyid v. Belgium* the Grand Chamber held that a slap on the face of each of two young male members of an ethnic minority by a policeman during altercations in a police station was degrading treatment. Degrading treatment and inhuman treatment often overlap and in *Ireland v. the United Kingdom* the Court found the five interrogation techniques to be degrading as well as inhuman.

Just as in the case of torture or inhuman treatment, the test as to what constitutes degrading treatment depends on all circumstances of the case, such as the context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some cases, sex, age, ethnicity and state of health of the victim. The public nature of humiliation may be relevant to establishing its degrading character, but the fact that a person is humiliated in their own eyes may suffice.[77] The intention to humiliate or debase is not essential for a treatment to be classified as degrading. What is more important is the lack of respect for the personality of the victim and whether the treatment is designed to humiliate or debase. However, the lack of any such purpose cannot conclusively rule out a finding of a breach of Article 3.[78]

Slavery (Article 4)

The Court has adopted the classic definition of slavery contained in the 1926 Slavery Convention, which requires the exercise of a genuine right of ownership and reduction of the status of the individual concerned to an "object" (*Siliadin v. France*[79]).

Servitude (Article 4)

Servitude is a "particularly serious form of denial of freedom" (*Van Droogenbroeck v. Belgium*[80]). For Convention purposes it has been defined as "an obligation to provide one's services that is imposed by the use of coercion" (*Siliadin v. France*[81]). It is to be linked with the concept of slavery, both of which are examined

76 *Pretty v. the United Kingdom*, judgment of 29 April 2002, no. 2346/02, para 52.

77 *Tyrer v. the United Kingdom*, judgment of 25 April 1978, no. 5856/72, para. 32.

78 *T. v. the United Kingdom*, [Grand Chamber] judgment of 16 December 1999, no. 24724/94, para 69, *V. v. the United Kingdom*, (Grand Chamber) judgment of 16 December 1999, no. 24888/94, para 71.

79 *Siliadin v. France*, judgment of 26 July 2005, no. 73316/01, para. 122.

80 *Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, no. 7906/77, para. 58.

81 *Siliadin v. France*, judgment of 26 July 2005, no. 73316/01, para. 124.

as questions of status. Servitude is also related to forced or compulsory labour (see below) and it has been regarded by the Court as an "aggravated" forced or compulsory labour; the distinguishing feature between them is the victim's feeling that their condition is permanent and that it is unlikely to change. It is sufficient that this feeling is based on objective criteria (e.g. the obligation for the 'victim of servitude' to live on another person's property and the impossibility of altering his condition) or brought about or kept alive by those responsible for the situation (*C.N. and V. v. France*[82]).

Forced labour or Compulsory labour (Article 4)

"Labour" is not limited to the sphere of manual labour; the word has the broad meaning of all work or service (*Van der Mussele v. Belgium*[83]). The Court has used the definition found in the ILO Convention No. 29[84] as a starting point and has accepted that for "forced or compulsory labour" to arise, there must be some physical or mental constraint, as suggested by the adjective "forced", as well as some overriding of the person's will, as suggested by the adjective "compulsory". Accordingly, what there has to be is **work exacted under the menace of any penalty** and also performed against the will of the person concerned, that is, **work for which they have not offered themselves voluntarily**.

The notion of "penalty" found in the first criterion is used in the broad sense; it may go as far as physical violence or restraint, but it can also take subtler forms, of a psychological nature, such as threats to denounce victims to the police or immigration authorities when their employment status is illegal. See, for example, *C.N. and V. v. France*[85], in which case the Court held that for the applicant teenagers being sent back to their country of origin and having to abandon their younger sisters was seen by the first applicant as a "penalty" and the threat of being sent back as the "menace" of that "penalty" being executed[86]. In *Chowdury and Others v. Greece*[87], the applicants, who were in a vulnerable situation as illegal migrants without resources at risk of being arrested, detained and deported, continued working. They were overseen by armed guards who on one occasion opened fire on them. They were also afraid that they would lose their overdue - and very low - wages, without which they could neither live elsewhere in Greece nor leave the country[88].

82 *C.N. and V. v. France*, judgment of 11 October 2012, no. 67724/09, para. 91.

83 *Van der Mussele v. Belgium*, judgment of 23 November 1983, no. 8919/80, para. 33.

84 Forced Labour Convention, 1930 (No. 29) - Entry into force: 01 May 1932.

85 *C.N. and V. v. France*, judgment of 11 October 2012, no. 67724/09, paras. 68-79.

86 Ibid.paras. 60 and 78.

87 *Chowdury and Others v. Greece*, judgment of 30 March 2017, no. 21884/15.

88 Ibid.para. 95.

As to the issue of whether the person offered themselves voluntarily for the work in question, the individual's prior consent is not decisive; the Court will rather have regard to all the circumstances of the case in the light of the underlying objectives of Article 4, as these derive from the exceptions set out in paragraph 3 and include the general interest, social solidarity and what is normal in the ordinary course of business. In terms of the latter, the Court has taken into account whether the services rendered fall outside the ambit of the normal professional activities of the person concerned; whether the services are remunerated or not or whether the service includes another compensatory factor; whether the obligation is founded on a conception of social solidarity (e.g. regarding a medical practitioner's duty to participate in an emergency service); and whether the burden imposed is disproportionate.[89]

Human trafficking (Article 4)

In *Rantsev v. Cyprus and Russia*[90], the Court considered it unnecessary to identify whether the situation of the trafficked person constituted "slavery", "servitude" or "forced and compulsory labour" and asserted that "trafficking itself…falls within the scope of Article 4"[91]. In subsequent cases, the Court sought to explain and justify the incorporation of the phenomenon of human trafficking within the scope of Article 4 of the Convention[92.] In *S.M. v. Croatia*, the Court defined the concept of human trafficking as covering trafficking in human beings, whether national or transnational, whether or not connected with organised crime, in so far as the constituent elements of the international definition of trafficking in human beings, under the Anti-Trafficking Convention and the Palermo Protocol, are present, which requires examination of the relevant circumstances of a particular case.[93] In *V.C.L. and A.N. v. the United Kingdom*, the failure to give a recognised victim of trafficking their associated rights was found to be a violation.[94]

Deprivation of liberty (Article 5)

Whether individuals are being ***deprived*** of their liberty or their movement is merely ***restricted*** depends on examination of the concrete situation, account being taken of the whole range of criteria such as the type, duration, effects, and manner of

89 *Graziani-Weiss v. Austria*, judgment of 18 October 2011, no. 31950/06, para. 38.

90 *Rantsev v. Cyprus and Russia*, judgment of 7 January 2010, no. 25965/04.

91 Ibid.para. 282.

92 *Chowdury and Others v. Greece*, judgment of 30 March 2017, no. 21884/15.

93 *S.M. v. Croatia*, [Grand Chamber] judgment of 25 June 2020, no. 60561/14, para. 296

94 *V.C.L. and A.N. v. the United Kingdom*, judgment of 16 February 2021, nos. 77587/12 and 74603/12.

implementation of the measure in question (*Guzzardi v. Italy*[95], *Riera Blume v. Spain*[96], *Koniarska v. the United Kingdom*[97], *Austin and Others v. the United Kingdom*[98], *Creangă v. Romania*[99]). The distinction is important because deprivations of liberty are only permissible in an exhaustive list of situations and are regulated procedurally by Article 5. Restrictions on movement are regulated by Article 2 of Protocol 4. *De Tommaso v. Italy*[100] comprehensively discusses the difference between the two. In some cases, such as detention under Article 5 § 1(f), the Court has dispensed with the requirement of necessity and proportionality (*Saadi v. the United Kingdom*[101]) which are still required for restrictions under Article 2 Protocol 4 (freedom of movement).

Security of the person (Article 5)

Although Article 5 § 1 guarantees the right to liberty and to "security of the person," this latter aspect has proved to have no independent existence. It cannot be used to cover ideas of physical integrity which fall, where appropriate, within the scope of Article 8 (right to respect for private and family life) and more extreme cases, Article 3 (prohibition of torture and ill treatment). The term security only refers to protection from arbitrariness in relation to deprivation of liberty.[102]

Criminal (Article 6)

A person may have been subjected to a "criminal charge" or proceedings for the purpose of attracting the protection of Article 6 (right to a fair trial) even though no "criminal" proceedings in the formal sense of the domestic law were involved. Otherwise, if the classification of an offence in the law of the contracting parties was regarded as decisive, a state would be free to avoid the Convention obligation to ensure a fair trial in its discretion. It would also result in this context in an unacceptably uneven application of the Convention from one state to another. In determining the existence of a "criminal" charge, *Engel v. Netherlands*[103] established three criteria to be

95 *Guzzardi v. Italy*, judgment of 6 November 1980, no. 7367/76, para. 92.

96 *Riera Blume v. Spain*, judgment of 14 October 1999, no. 37680/97, para. 28.

97 *Koniarska v. the United Kingdom*, decision of 12 October 2000, no. 33670/96.

98 *Austin and Others v. the United Kingdom*, [Grand Chamber] judgment of 15 March 2012, nos. 39692/09, 40713/09 and 41008/09, para. 57.

99 *Creangă v. Romania*, [Grand Chamber] judgment of 23 February 2012, no. 29226/03, para. 91.

100 *De Tommaso v. Italy*, [Grand Chamber] judgment of 23 February 2017, no. 43395/09, paras. 80-89.

101 *Saadi v. the United Kingdom*, [Grand Chamber] judgment of 29 January 2008, no. 13229/03, para. 72.

102 *Khudoyorov v. Russia*, judgment of 8 November 2005, no. 6847/02, para. 157.

103 *Engel and others v. Netherlands*, judgment of 8 June 1976, nos. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, para. 82.

read in light of the autonomy of the concept under the Convention. The Convention institutions have regard to (i) the classification of the offence in domestic law, (ii) the nature of the offence and (iii) the severity of the penalty prescribed. The first criteria is decisive in that if the domestic law classifies certain offence as criminal, Article 6 applies and it is imperative that the accused is given a fair trial which complies with that provision. Otherwise, if the domestic law does not classify an offence as criminal, then the other two criteria apply (see *Öztürk v. Germany*[104]). These two criteria are, in principle, alternative. A cumulative approach may, however, be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge.[105] When analysing the second criteria, that is the nature of the offence, the Court will consider whether the legal rule in question is directed solely at a specific group or is of a generally binding character;[106] whether the proceedings are instituted by a public body with statutory powers of enforcement;[107] whether the legal rule has a punitive or deterrent purpose[108]; whether the legal rule seeks to protect the general interests of society usually protected by criminal law;[109] whether the imposition of any penalty is dependent upon a finding of guilt;[110] how comparable procedures are classified in other Council of Europe member States[111]. As to the third criteria, the severity of penalty is assessed by reference to the maximum potential penalty for which the relevant law provides.[112]

Charge (Article 6)

In order for Article 6 to apply, a person must be subject to a criminal 'charge'. "Charge" is "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" or some other act short of an official notification which carries "the implication of such an allegation and which substantially affects the situation of the suspect.[113]. A person has been found to be subject to a 'charge' when arrested for a criminal offence; when notified that he is being charged with an offence; when a preliminary investigation has been opened

104 *Öztürk v. Germany*, judgment of 21 February 1984, no. 8544/79, paras. 49-50.

105 *Bendenoun v. France*, judgment of 24 February 1994, no. 12547/86, para. 47.

106 Ibid.

107 *Benham v. the United Kingdom*, judgment of 10 June 1996, no. 19380/92, para. 56.

108 *Öztürk v. Germany*, judgment of 21 February 1984, no. 8644/79, para. 53; *Bendenoun v. France*, para. 47 (see note 105)

109 *Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia*, judgment of 23 October 2018, no. 47072/15, para. 42

110 Supra note 109.

111 Supra note 110.

112 *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, nos. 7819/77 and 7878/77. Para. 72.)

113 *Simeonovi v. Bulgaria*, [Grand Chamber] judgment of 12 May 2017, no. 21980/04, para. 110.

and, although not under arrest, the applicant has 'officially learnt of the investigation or begun to be affected by it'; when authorities investigating customs offences require a person to produce evidence and freeze his bank account and when the applicant's shop has been closed pending the outcome of criminal proceedings. The Court has held that a person is 'substantially affected' from the moment that they are questioned as a suspect.[114] Article 6 applies to any appeal proceedings against conviction or sentence that are provided.[115] Constitutional court proceedings involving claims alleging a violation of constitutional rights are included insofar as they are decisive for the outcome of a criminal case.[116] Article 6 ceases to apply once the criminal proceedings against the accused are completed or when they are discontinued.[117] Likewise, Article 6 does not apply to proceedings relating to the execution of a sentence against a person once finally convicted of an offence and hence no longer 'charged' with it.[118] Consequently, Article 6 also does not apply to proceedings for an amnesty for a convicted person,[119] an application for a reopening of criminal proceedings[120] or a plea of nullity.[121] Neither extradition nor deportation proceedings (even where deportation is imposed as a criminal sanction) have been held to be covered by Article 6 (*Maaouia v. France*[122]).

Civil right (Article 6)

The Convention institutions have refrained from formulating any abstract definition of "civil rights". Instead, they have ruled on the particular facts of each case. The concept of "civil rights" is not to be interpreted solely by reference to the respondent State's domestic law but is an autonomous notion based on the character of the right (*König v. Germany*[123]). The pertinent issue is whether **the outcome of the proceedings is decisive for private rights and obligations.** Furthermore, there must, at least on arguable grounds, be a basis for the right in domestic law, irrespective of whether that right is protected under the Convention (*Micallef v. Malta*[124]). The character of the legislation which governs how the matter is to be determined (civil,

114 *Yankov and Others v. Bulgaria*, judgment of 23 September 2010, no. 4570/05, para. 23.

115 *Eckle v. Germany*, judgment of 15 July 1982, no. 8130/78, para. 76.

116 *Gast and Popp v. Germany*, judgment of 25 February 2000, no. 29357/95, paras. 63-66.

117 Supra note 117, paras. 77-78.

118 *Buijen v. Germany*, judgment of 1 April 2010, no. 27804/05, para. 40.

119 *Montcornet de Caumont v. France*, decision of 13 May 2003, no. 59290/00.

120 *Moreira Ferreira v. Portugal* (No.2), [Grand Chamber] judgment of 11 July 2017, no. 19867/12, paras. 60-61.

121 *Franz Fischer v. Austria*, decision of 6 May 2003, no. 27569/02.

122 *Maaouia v. France*, [Grand Chamber] judgment of 5 October 2000, no. 39652/98, para. 40.

123 *König v. Germany*, judgment of 28 June 1978, no. 6232/73, paras. 88-90.

124 *Micallef v. Malta*, [Grand Chamber] judgment of 15 October 2009, no. 17056/06, para. 74.

commercial, administrative law, and so on) or the nature of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, and so forth) are not of decisive consequence (*ibid.*).

Dispute concerning civil rights and obligations (Article 6)

Article 6 applies only to cases in which there is a dispute at the national level between two private parties or between a private party and the state, the outcome of which, as stated in the previous section, is decisive of the applicant's civil rights and obligations. The Court has held that the term dispute should not be 'construed too technically' and that it should be given a 'substantive rather than a formal meaning'.[125] The dispute may concern questions of law or fact.[126] It does not have to pertain to the very existence of the right concerned and it may relate to its scope or the way the beneficiary may avail himself of it.[127] Article 6 does not apply to a non-contentious and unilateral procedure which does not involve opposing parties and which is available only where there is no dispute over rights.[128] For Article 6 to apply, the dispute must be 'genuine and of a serious nature'.[129] A dispute must be justiciable, which means that it ultimately must be resolved by a body with judicial function (tribunal).[130]

Tribunal (Article 6)

The right to a fair trial prescribed by Article 6 Paragraph 1 requires cases to be heard by an 'independent and impartial tribunal established by law'. The principles defining the notion of a 'tribunal' were revisited in *The Guðmundur Andri Ástráðsson v. Iceland* case[131] in which the Court clarified that a body to be considered a 'tribunal' must meet three cumulative elements. Firstly, a 'tribunal' is characterised in the substantive meaning of the term by its judicial function, meaning that a tribunal determines matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. The tribunal has power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party.[132] One of the fundamental aspects of the rule of law

125 *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, nos. 6878/75 and 7238/75, para. 45.

126 *Albert and Le Compte v. Belgium*, judgment of 10 February 1983, nos. 7299/75 and 7496/76, para. 29.

127 Supra note 125., para. 49.

128 *Alaverdyan v. Armenia*, decision of 24 August 2010, no. 4523/04, para. 35.

129 *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, nos. 7151/75 and 7152/75, para. 81.

130 *Van Marle v. Netherlands and others*, judgment of 26 June 1986, nos. 8543/79, paras. 36 and 37.

131 *Guðmundur Andri Ástráðsson v. Iceland*, [Grand Chamber] judgment of 1 December 2020, no. 26374/18, paras. 219-230.

132 *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, no. 16034/90, para. 45.

is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question[133]. In addition, only an institution that has full jurisdiction merits the designation "tribunal" for the purposes of Article 6 § 1.[134]

A "tribunal" must also satisfy a series of further requirements – independence, in particular from the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure – several of which appear in the text of Article 6 § 1.

Lastly, the very notion of a "tribunal" implies that it should be composed of judges selected on the basis of merit – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law. Such merit-based selection not only ensures the technical capacity of a judicial body to deliver justice as a "tribunal", but it is also crucial in terms of ensuring public confidence in the judiciary and serves as a supplementary guarantee of the personal independence of judges.

An inherent element of the notion of a 'tribunal' is that it must be 'established by law'. The "law" by which a "tribunal" may be deemed to be "established" comprises any provision of domestic law – including, in particular, provisions concerning the independence of the members of a court – which, if breached, would render the participation of one or more judges in the examination of a case "irregular". The phrase "established by law" covers not only the legal basis for the very existence of a "tribunal", but also compliance by the tribunal with the particular rules that govern it and the composition of the tribunal in a particular case.

Family (Article 8)

The concept of the "family" is now understood as extending beyond formal legitimate relationships and arrangements (*Johnston and Others v. Ireland*[135]). The Convention organs have increasingly taken into account the substance and reality of relationships, acknowledging developments in social mores and the law in European states, and now includes relationships between children, biological, legal and social parents, step-parents and grandparents. Historically, the European Court of Human Rights did not generally recognise homosexual relationships as family life but as a part

133 *Brumărescu v. Romania*, [Grand Chamber] judgment of 28 October 1999, no. 28342/95, para. 61.

134 *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018, nos. 40575/10 and 67474/10, para. 139.

135 *Johnston and others v. Ireland*, judgment of 18 December 1986, no. 9697/82, paras 55-56.

of private life.[136] However, the Court now considers that where such a relationship is akin to marriage it can be considered family life.[137] The increased incidence of assisted reproductive technology (ART), including surrogacy, has presented new challenges for the Court including the recognition of parentage of children born through ART.[138]

Private life (Article 8)

This concept embraces the sphere of immediate personal autonomy. This covers aspects of moral and physical integrity (*X and Y v. Netherlands*[139]) (see also below under "moral and physical integrity"). It is wider than the right to "privacy" in the sense of being able to keep hidden or secret things which one does not want to disclose or expose. Private life ensures a sphere within which everyone can freely pursue the development and fulfilment of his personality. This comprises the right to an identity (including names and one's own image) and includes the right to develop relationships with other people, in particular in the emotional field and including sexual relationships with other persons, as well as activities of a professional or business nature (*Niemietz v. Germany*[140]). The test for determining when employment-related activities may affect "private life" has been elaborated in a recent Grand Chamber judgment *Denisov v. Ukraine*. In this case the Court stated some typical aspects of private life which may be affected in employment-related disputes, such as "(i) the applicant's "inner circle", (ii) the applicant's opportunity to establish and develop relationships with others, and (iii) the applicant's social and professional reputation"[141]. The notion of "private life" includes the "network of personal social and economic relations that make up the private life of every human being" (*Slivenko v. Latvia*[142]). The Court has now recognised that a person's reputation will often be significant in developing those relationships and as such is therefore protected under this rubric of Article 8. The right to one's image has been examined with respect to the publication of photos of people who are, generally or have come temporarily to be, in the public eye (in which cases the Court has recognised the need for a balancing exercise between the right to private life and the freedom of expression, see *Von Hannover v. Germany (No. 2)*[143])

136 *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, no. 7525/76, para. 40.

137 *Orlandi and Others v. Italy*, judgment of 14 December 2017, no. 26431/12 and others, para. 143.

138 *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, 10 April 2019, P16-2018-001.

139 *X and Y v Netherlands*, judgment of 26 March 1985, no. 8978/80, para. 22.

140 *Niemietz v. Germany*, judgment of 16 December 1992, no. 13710/88, para. 29.

141 *Denisov v. Ukraine*, [Grand Chamber] judgment of 25 September 2018, no. 76639/11, paras. 95-117.

142 *Slivenko v. Latvia*, [Grand Chamber] judgment of 9 October 2003, no. 48321/99, para. 96.

143 *Von Hannover v. Germany (No. 2)*, [Grand Chamber] judgment of 7 February 2012, nos. 40660/08 and 60641/08, paras 95-126.

as well as "ordinary persons" (in which cases no interference could be justified by a legitimate aim protected by the Convention, see (*Georgi Nikolaishvili v. Georgia*[144]).

Moral and physical integrity (Article 8)

An individual's "moral and physical integrity", that is, physical and psychological well-being, is protected under the private life rubric of Article 8 (see above under "private life").

It is, however, also a term that is being used in connection to treatment or conditions that fall below the "threshold of severity" required by Article 3 (*Costello-Roberts v. the United Kingdom* and *Raninen v. Finland*[145]).

Home (Article 8)

Home has been given a wide definition by the Convention organs. It is not necessary that a home be lawfully established, with more significance attaching to the nature of the occupation rather than to its legality, but it does not extend to a place which one would like to occupy as one's home. Further, since "home" and "private life" may overlap with business and professional activities, the protection of Article 8 (right to respect for private and family life) has been found to extend for individuals to their personal offices (*Niemietz v. Germany*[146]) and for companies to company premises (*Société Colas Est and Others v. France*[147]). The concept extends beyond conventional houses and apartments (see *Öneryildiz v. Turkey*[148] where the home in question was a shack constructed on a rubbish tip).

Freedom of expression (Article 10)

Considered as one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man (*Handyside v. the United Kingdom*[149]), freedom of expression has been interpreted broadly; accordingly, any potential exceptions to it have been interpreted narrowly (*Sunday*

144 *Georgi Nikolaishvili v. Georgia*, judgment of 13 January 2009, no. 37048/04, para. 123.

145 *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, no. 13134/87, paras. 29-36, and *Raninen v. Finland*, judgment of 16 December 1997, no. 20972/92, paras. 52-64.

146 *Niemietz v. Germany*, judgment of 16 December 1992, no. 13710/88, para. 30.

147 *Société Colas Est and Others v. France*, judgment of 16 April 2002, no. 37971/97, paras. 40-41.

148 *Öneryildiz v. Turkey*, judgment of 30 November 2004, no. 48939/99.

149 *Handyside v. the United Kingdom*, judgment of 7 December 1976, no. 5493/72, para. 49.

Times v. the United Kingdom (No.1)[150]). The Article covers not only "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb (*Handyside v. the United Kingdom*[151]), including incitement to hatred, obscenity and blasphemy, and pornography.

Any content is protected (e.g. political views, advertising, artistic expression, etc.) as is any means of expression, including (but not limited to) books, leaflets, cartoons, paintings, workshops and seminars, dissemination via the internet and press. Through its case-law, the Court has extended the protection offered by this Article beyond the text of the provision and incorporated the right to access to information[152], the protection of whistle-blowers[153] and the reporting of irregularities in the conduct of civil servants[154]. Article 10 is a qualified right (for more information about qualified rights see Section III.2 below), and in interpreting the possible permissible limitations, the Court has developed the autonomous concept of whether an interference is "proportionate to the legitimate aim pursued", which is determined having regard to all the circumstances of the case, particularly the existence of a pressing social need, assessment of the nature and severity of sanctions, and whether national courts had given relevant and sufficient reasons for the interference.

Associations (Article 11)

The Court has examined the meaning of the autonomous concept of "associations" in light of the link between democracy, pluralism and freedom of association (*Chassagnou and others v. France*[155]). An obvious example of "associations" playing a crucial role in ensuring pluralism and democracy are political parties. However, the concept includes any legal entity established by individuals with the aim to act collectively in a field of mutual interest, such as associations protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness (*Gorzelik and others v Poland*[156]). Where an association has both private and public

150 *Sunday Times v. the United Kingdom (No. 1)*, judgment 26 April 1979, no. 6538/74, para. 65.

151 *Handyside v. the United Kingdom*, judgment of 7 December 1976, no. 5493/72, para. 49.

152 *Magyar Helsinki Bizottság v. Hungary*, [Grand Chamber] judgment of 8 November 2016, no. 18030/11.

153 *Guja v. Moldova*, [Grand Chamber] judgment of 12 February 2008, no. 14277/04, para. 70

154 *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [Grand Chamber] judgment of 27 June 2017, no. 17224/11, paras. 86-87

155 *Chassagnou and others v. France*, [Grand Chamber] judgment of 29 April 1999, nos. 25088/94, 28331/95 and 28443/95, para. 100.

156 *Gorzelik and others v. Poland*, [Grand Chamber] judgment of 17 February 2004, no. 44158/98, para. 92.

law characteristics, the Court will examine which characteristics prevail. For example, in *Sigurjonsson v. Iceland*[157], the Court concluded that, although the association under question performed certain functions which were to some extent provided for in the applicable legislation and served not only its members but also the public at large, the association had in fact been established under private law and enjoyed full autonomy in determining its own aims, organisation and procedure[158].

Right to marry (Article 12)

The wording of Article 12 has been considered to suggest that the right to marry is limited to unions between a man and a woman. In *Christine Goodwin v. the United Kingdom*[159], the Court accepted that the right to marry extends to transsexuals, on the basis that the terms "men" and "women" can no longer be assumed to refer to a determination of gender by purely biological criteria[160]. On the contrary, it does not extend to same-sex marriages, as at the time that the Court gave its ruling in *Schalk and Kopf v. Austria*[161], there seemed to be no European consensus regarding the issue[162]. The right to marry does not include a right to divorce (*Johnston and Others v. Ireland*[163]). In contrast to the wider Article 8, the right to found a family in Article 12 seems to be restricted to married couples. The right of same-sex couples to form civil unions has, for example, been examined in light of Article 14 taken together with Article 8 (see *Vallianatos and Others v. Greece*[164] and *Oliari and Others v. Italy*[165]). A general ban on marriage for people with "insufficient" immigration status and/or the imposition of excessive fees will violate Article 12 (*O'Donoghue and others v. the United Kingdom*[166]).

Effective remedy (Article 13)

The remedy available at national level to deal with "arguable complaints" regarding the substance of rights and freedoms guaranteed by the Convention must

157 *Sigurður A. Sigurjónsson v. Iceland*, judgment of 30 June 1993, no. 16130/90.

158 Ibid.para. 31.

159 *Christine Goodwin v. the United Kingdom*, [Grand Chamber] judgment of 11 July 2002, no. 28957/95.

160 Ibid.para. 100.

161 *Schalk and Kopf v. Austria*, judgment of 24 June 2010, no. 30141/04.

162 Ibid.para. 58.

163 *Johnston and others v. Ireland*, judgment of 18 December 1986, no. 9697/82, paras. 51-54.

164 *Vallianatos and Others v. Greece*, [Grand Chamber] judgment of 7 November 2013, nos. 29381/09 and 32684/09, paras. 70-92.

165 *Oliary and Others v. Italy*, judgment of 21 July 2015, nos. 18766/11 and 36030/11, paras. 159-188.

166 *O'Donoghue and others v. the United Kingdom*, judgment of 14 December 2010, no. 34848/07.

be effective in practice as well as in law (e.g. *Iovchev v. Bulgaria*[167]) – in the sense that if used it would be able to prevent the alleged violation, or if the violation had already occurred, the applicant could obtain appropriate redress.

Various factors may play a role when determining the effectiveness of a remedy: the circumstances of the case (for example, compensation may not be enough, e.g. *Petkov and Others v. Bulgaria*[168]), the powers and the procedural guarantees which the competent national authority affords (e.g. *Klass and Others v. Germany*[169]), or the right relied on (for example, in expulsion cases, where there is a complaint of a real risk of violation of the person's rights under Article 2, or Article 3, or Article 4 of Protocol No. 4, effectiveness also requires that there is access to a remedy with automatic suspensive effect; see *De Souza Ribeiro v. France*[170]). The Court has recognised the importance of availability of effective remedies in the context of secret surveillance measures in its Grand Chamber judgment in the case *Zakharov v. Russia*.[171] In this case the Court noted the special features of these measures which make it difficult for applicants to prove that actual measures have been in fact applied due to their secret nature. In this context, the Court reaffirmed the significance of subsequent notification to the victims of the measures undertaken and the inextricable link of such notification with the effectiveness of remedies before the courts. The Court reaffirmed the principle established in *Kennedy*[172] that the key issue is to ensure that secret surveillance systems do not end up "being effectively unchallengeable" and if applicants did not have access to effective remedies, they could challenge the law *in abstracto*. In *Zakharov*, the Court observed that persons in Russia whose communications have been intercepted are not notified of this fact at any point or under any circumstances and there is a lack of effective possibility to request and obtain information about interceptions from the authorities and, consequently, found a violation.

Victim (Article 34)

A victim is a person or persons directly or indirectly affected by the alleged violation. A victim in this sense may be an individual, group of individuals, or non-governmental organisation whose rights under the Convention have been violated or are threatened with violation. Natural persons (human beings) can be victims of Convention violations, as can legal persons such as companies. When it comes to

167 *Iovchev v. Bulgaria*, judgment of 2 February 2006, no. 41211/98, par. 142.

168 *Petkov and Others v. Bulgaria*, judgment of 11 June 2009, nos. 77568/01, 178/02 and 505/02, para. 79.

169 *Klass and Others v. Germany*, judgment of 6 September 1978, no. 5029/71, para. 67.

170 *De Souza Ribeiro v. France*, [Grand Chamber] judgment of 13 December 2012, no. 22689/07, para. 82.

171 *Zakharov v. Russia*, [Grand Chamber] judgment of 4 December 2015, no. 47143/06, para. 165.

172 *Kennedy v. the United Kingdom*, judgment of 18 May 2010, no. 26839/05, paras. 122-124.

cases brought by shareholders of a company, the Court has considered it important to make a distinction between complaints brought by shareholders about measures affecting their rights as shareholders (in which case they could claim their victim status within the meaning of Article 34 of the Convention)[173] and those about acts affecting companies, in which they hold shares (in which case they cannot be seen as victims, within the meaning of Article 34 of the Convention). However, the Court has established certain limitations to this principle, primarily where the company and its shareholders are so closely identified with each other that it is artificial to distinguish between the two[174] or if it is warranted by "exceptional circumstances"[175]. **It is not necessary to show quantifiable damage to be a victim or to bring national proceedings** under the Convention. Complaints to the Strasbourg Court may be declared inadmissible if the victim has suffered "no significant disadvantage" but the person (legal or physical) is still a "victim" of a violation for the purposes of national law. The question of damage suffered (as opposed to "no significant disadvantage") is only relevant to the issue of just satisfaction.

Property or possessions (Article 1 Protocol 1)

These terms cover a wide range of interests. ***Possession*** has an autonomous meaning not limited to ownership of physical goods – other rights and interests constituting assets can also be regarded as ***property rights*** (*Gasus Dosier v. The Netherlands*[176]) such as business and professional interest (*Tre Traktörer Aktiebolag v. Sweden*[177]), intellectual property (*Anheuser-Busch v. Portugal*[178]) and enforceable judgment debts (*Ryabykh v. Russia*[179] and the *Stran Greek Refineries case*[180]). It is the debt itself which is the possession, as Article 1 of Protocol 1 only applies to existing possessions and does not otherwise confer a right to obtain property (*Marckx v. Belgium*[181]). There is also some authority for the view that a trivial effect on property rights may not constitute an interference (*Langborger v Sweden*[182]).

173 *Albert and Others v. Hungary* [Grand Chamber] judgment of 7 July 2020, no. 5294/14, paras. 126-134, and the references cited therein

174 *Ankarcrona v. Sweden* (dec.), 27 June 2000, no. 35178/97.

175 Supra note 175.

176 *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, judgment of 23 February 1995, no. 15375/89, para. 53.

177 *Tre Traktörer Aktiebolag v. Sweden*, judgment of 7 July 1989, no. 10873/84.

178 *Anheuser-Busch Inc v. Portugal*, judgment of 11 January 2007, no. 73049/01.

179 *Ryabykh v. Russia*, judgment of 24 July 2003, no. 52854/99, para. 61.

180 *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 09 December 1994, no. 13427/87, paras. 59-62.

181 *Marckx v Belgium*, judgment of 13 June 1979, no. 6833/74, para. 50.

182 *Langborger v. Sweden*, judgment of 22 June 1989, no. 11179/84, para. 41.

Collective expulsion/rejection (Article 4 of Protocol 4)

The wrong addressed by this provision is the failure to conduct an individualised assessment of each person's situation rather than the consequences for them of the expulsion or rejection. It is therefore different from a violation of Article 3 occasioned by the expulsion of those who are at risk of prohibited ill-treatment, although sometimes the same situation may give rise to both violations. It applies to all aliens/migrants. It can apply to group expulsions (see e.g. *Čonka v. Belgium*[183]) or to group pushbacks at the border (see e.g. *M.K and others v. Poland*[184]). Consideration must be given to the individual's situation including their vulnerability: see *Moustahi v. France,* in which the Court found a violation of Article 4 of Protocol No. 4 when unaccompanied minors (aged only 5 and 3) were attached to an unrelated adult in order to facilitate their speedy removal from Mayotte (a French Department in the Indian Ocean) without any consideration being given to their personal circumstances[185].

But not all expulsions of a group of people will be considered collective (see *Khlaifia and Others v. Italy*[186], in which case no violation of Article 4 of Protocol 4 was found on the basis that each of the applicants had been identified individually and they had had a genuine and effective possibility of raising arguments against their expulsion[187]). Moreover, an applicant's own culpable conduct in approaching the border is to be taken into account when assessing whether Article 4 of Protocol 4 is engaged (see *N.D. and N.T. v. Spain*, in which the lack of an individualised procedure for removal was held to be the product of the applicants' own conduct in attempting to gain unauthorised entry, when the Court considered that opportunities existed to seek authorisation to enter – thus the respondent State was not liable for failing to make a legal remedy available[188]). The 'culpable conduct' test was applied in *M.K and others v. Poland*, where the fact that the applicants had behaved in a legal manner factored into the finding of a violation[189]. It is a rapidly evolving area of the law.

183 *Čonka v. Belgium*, judgment of 5 February 2002, no. 51564/99, paras. 59-63.

184 *M.K and others v. Poland*, judgment of 23 July 2020, no. 40503/17. This highlighted the common practice of the Polish authorities systematically pushing back asylum seekers at the border between Poland and Belarus. Attention was drawn due to the practice of holding very brief interviews, during which the foreigners' statements were disregarded; emphasis being placed on the arguments that allowed them to be categorised as economic migrants; and misrepresenting the statements made by the foreigners in very brief official notes, which constituted the sole basis for issuing refusal-of-entry decisions and returning them to Belarus. The Court concluded that the decisions, which formed part of a wider policy of pushing back asylum seekers application for international protection, constituted a collective expulsion of aliens within the meaning of Article 4 of Protocol No. 4.

185 *Moustahi v. France*, judgment of 25 June 2020, no.9347/14.

186 *Khlaifia and Others v. Italy*, [Grand Chamber] judgment of 15 December 2016, no. 16483/12.

187 Ibid.paras. 248-254.

188 *N.D. and N.T. v. Spain*, [Grand Chamber] judgment of 13 February 2020, nos. 8675/15 and 8697/15, paras. 241-243.

Prohibition of Abuse of Rights (Article 17)

Article 17 is applicable only on an exceptional basis and in extreme cases (*Paksas v. Lithuania*[190]; *Perinçek v. Switzerland*[191]). The Article's general purpose, insofar as it refers to groups or to individuals, is to prevent those with totalitarian aims from taking advantage of the provisions of the Convention in order to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention (see *Lawless v. Ireland (No. 3)*[192]). As a result, Article 17 is applicable only to rights that allow a person to engage in such activities, such as Articles 9, 10 and 11. It cannot, therefore, be the basis for depriving a person of other fundamental rights, such as for example those guaranteed by Articles 5 and 6 (*Lawless v. Ireland (No. 3)*[193]).

Notable examples of cases examined under Article 17 include cases related to the rights of communist parties (*German Communist Party v. the Federal Republic of Germany*; *United Communist Party of Turkey and Others v. Turkey*[194]) and to potential limitations to the freedom of expression in cases concerning statements denying the Holocaust, justifying a pro-Nazi policy, alleging the prosecution of Poles by the Jewish minority and the existence of inequality between them, or linking all Muslims with a grave act of terrorism (*Pavel Ivanov v. Russia*[195] with references to such cases).

Limitation on Use of Restrictions of Rights (Article 18)

The aim and purpose of Article 18 is to prohibit the misuse of power. Article 18 complements the clauses which provide for limitations on the rights and freedoms set forth in the Convention and can only be invoked in relation to provisions that have limitations. Its wording "shall not be applied for any purpose other than" matches

189 *M.K and others v. Poland*, judgment of 23 July 2020, nos. 40503/17, 42902/17 and 43643/17, para 207.

190 *Paksas v. Lithuania*, [Grand Chamber] judgment of 06 January 2011, no. 34932/04, paras. 87-88.

191 *Perinçek v. Switzerland*, [Grand Chamber] judgment of 15 October 2015, no. 27510/08, para. 114.

192 *Lawless v. Ireland (No. 3)*, judgment of 1 July 1961, no. 332/57, p. 18, para. 7.

193 Ibid.

194 *German Communist Party v. the Federal Republic of Germany*, decision of 20 July 1957, no. 250/57; *United Communist Party of Turkey and Others v. Turkey*, [Grand Chamber] judgment of 30 January 1998, no. 19392/92.

195 *Pavel Ivanov v. Russia*, decision of 20 February 2007, no. 35222/04, p. 4.

closely the wording of those provisions.[196] However, it also expressly prohibits the High Contracting Parties from restricting the rights and freedoms enshrined in the Convention for purposes not prescribed by the Convention itself, and to this extent it is autonomous[197]. It cannot be invoked independently and can only be applied in conjunction with other substantive Articles of the Convention. However, there can be a breach of Article 18 even if there is no breach of the Article in conjunction with which it is being applied.

Article 18 can only be applicable when there is an interference with a substantive right guaranteed by the Convention. This interference must be alleged by the State to be permitted by the prescribed limitations. However, even if the imposed restrictions do not meet all the requirements prescribed by the text of the Convention, this does not necessarily have to raise an issue under Article 18.[198]

A separate examination of a complaint under that Article is only warranted if the claim that a restriction has been applied for a purpose not prescribed by the Convention appears to be a fundamental aspect of the case.[199] When assessing complaints under Article 18, the Court must establish: whether the restriction of the applicant's right or freedom was applied for an ulterior purpose; whether the restriction pursued both a purpose prescribed by the Convention and an ulterior one, that is, whether there was a plurality of purposes; and, if that is the case, which purpose was predominant.[200] In case of plurality of purposes, the principles formulated in the Grand Chamber judgment *Navalnyy v. Russia*, offer guidance for situations where no legitimate aim or purpose has been shown, and where the predominant purpose is the one that truly actuated the authorities, and which was the overriding focus of their efforts.[201] This means that if a restriction also pursued an ulterior purpose, there will only be a breach of Article 18 if the ulterior purpose is predominant.[202] Likewise, if the prescribed purpose was the main purpose, the restriction does not run counter to Article 18 even if the authorities also wanted to achieve some other purpose. To determine which purpose is predominant it is necessary to consider all circumstances of the case, including the nature and degree of reprehensibility of the alleged ulterior purpose, whether the situation at hand is of a continuing nature or there are repetitive restrictions and patterns of misuse of power.

196 *Merabishvili v. Georgia* [Grand Chamber] judgment of 28 November 2017, no. 72508/13, paras. 287 and 293

197 *Ibid*., para. 288.

198 *Ibid*., para. 291.

199 *Ibid*.

200 *Ibid*., para. 309.

201 *Navalnyy v. Russia*, [Grand Chamber] judgment of 15 November 2018, no. 29580/12 and 4 others, para. 165.

202 *Ibid*., para. 318

The central issue regarding the application of this Article relates to the difficulty in proving the ulterior purpose behind the actions of an authority. This ulterior purpose is related to that of "bad faith", but they are not necessarily equivalent in each case.[203] The Court aims to make an objective assessment of the presence or absence of an ulterior purpose, and thus of a misuse of power.[204] Therefore the burden of proof is not borne by one or the other party.[205]

ii. Convention concepts that have been developed jurisprudentially

Equality of arms

Parties to a civil dispute or those charged with a criminal offence must not be placed at a substantial disadvantage vis-à-vis their opponent. This means that the parties must have knowledge of and the opportunity to comment on all the evidence adduced or filed by the other side. The requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies to criminal cases as well as civil rights and obligations cases (see *Dombo Beheer B.V. v. the Netherlands*[206]). The appearance of the fair administration of justice and the seriousness of what is at stake for the applicant is of relevance when assessing the adequacy and fairness of the procedures (*A.B. v. Slovakia*[207]). It is irrelevant whether "further, quantifiable unfairness" is derived from procedural inequality (*Bulut v. Austria*[208]). Where different time limits are applied to the State, to the disadvantage of the other party this may result in a lack of equality of arms (see *Platakou v. Greece*[209]).

Inherent procedural safeguards

Inherent procedural safeguards are found by the Court to be contained in Articles 2, 3 and 8 in themselves and exist in addition to the protection offered by Article 13 and, where applicable, Article 6. Articles 2 and 3 both require that effective investigations are conducted by the State into situations which raise suspicions that these provisions have been violated (see e.g. *Nencheva and others v. Bulgaria*[210], and

203 *Ibid*., para. 283.

204 *Ibid*., paras. 282-283.

205 *Supra note* 198, paras. 311-316.

206 *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, no. 14448/88, para. 33.

207 *A.B. v. Slovakia*, judgment of 04 March 2003, no. 41784/98, para. 55.

208 *Bulut v. Austria*, judgment of 22 February 1996, no. 17358/90, para. 49.

209 *Platakou v. Greece*, judgment of 11 January 2001, no. 38460/97.

210 *Nencheva and others v. Bulgaria*, judgment of 18 June 2013, no. 48609/06.

Assenov and others v. Bulgaria[211]). In cases concerning children, Article 8 requires the appropriate involvement of both the children and their parents in the administrative procedures that precede judicial proceedings (*McMichael v. the United Kingdom*[212]).

Effectiveness of Rights - "practical and effective not theoretical and illusory"

The Convention is a system for the protection of human rights. This makes it of crucial importance that it is interpreted and applied in a manner which renders these rights ***practical and effective not theoretical and illusory***. A State cannot therefore fulfil its obligations by protecting a right in a superficial or self-defeating manner. Although Article 1 requires that national law should protect Convention rights (expressly or in substance) this is a necessary but not sufficient requirement. Effective protection must exist in practice. For example, it is not enough for an accused simply to be provided with a lawyer. The legal assistance given must be effective (*Artico v. Italy*[213]).

Law and quality of law

To meet a Convention requirement that an interference is "in accordance with the law" or "prescribed by law" that law must be **precise and ascertainable** so that an individual may regulate his conduct by it: they must be able - if need be with appropriate legal advice - to *foresee*, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The law must also be adequately accessible, that is, the citizen must be able to have an indication about its existence that is adequate in the circumstances of the legal rules applicable to a given case (*Sunday times v. the United Kingdom*[214]*)*. A law authorising interferences with Convention rights must not be so broadly worded that it permits interferences which would violate the Convention (see *Hashman and Harrup v. the United Kingdom*[215]).

Living instrument

The Court has frequently emphasised that Convention protection and the content of the rights are not frozen at the date at which the text was adopted more than seventy years ago. The Convention is a "living instrument" (*Tyrer v. the United Kingdom*[216]) and the case law must therefore be "dynamic and evolutive" so that it is not a bar to reform or improvement (e.g. *Bayatyan v. Armenia*[217])**.** Matters such as sexual behaviour, the changing nature of family structures, and prisoners' rights have all been interpreted in the light of a consensus of modern European thinking. The Convention jurisprudence might sometimes be seen as being conservative, and to follow rather than leads the consensus.

211 *Assenov and others v. Bulgaria*, judgment of 28 October 1998, no. 24760/94.

212 *McMichael v. the United Kingdom*, judgment of 24 February 1995, no. 16424/90, para. 90.

213 *Artico v. Italy*, judgment of 13 May 1980, no. 6694/74, para. 33.

214 *Sunday Times v. the United Kingdom*, judgment 26 April 1979, no. 6538/74, para. 49.

215 *Hashman and Harrup v. the United Kingdom*, [Grand Chamber] judgment of 25 November 1999, no. 25594/94, paras. 31-43.

III. CATEGORIES OF RIGHTS

The Convention could be taken as embracing four broad classes of rights: absolute rights; qualified rights; rights relating to the administration of justice; rights with inherent restrictions.

1. Absolute rights

Absolute rights are the rights which cannot be interfered with under any circumstances. States cannot derogate from their obligations under these Articles even in the declared state of emergency under Article 15 and these rights cannot be balanced against other interests. They include the right to life (**Article 2**), prohibition of torture (**Article 3**), prohibition of slavery and servitude (**Article 4 § 1**), no punishment without law (**Article 7**), abolition of the death penalty (**Article 1 of Protocol 6** and **Article 1 of Protocol 13**)[218], and the right not to be tried or punished twice (**Article 4 of Protocol 7**).

Article 15 of the Convention permits derogations in time of emergency, but makes it clear that no derogation from Articles 2, 3, 4 § 1, 7, or from Article 1 of Protocol 6, Article 4 of Protocol 7 and Article 1 of Protocol 13 can be made under that provision.

Article 2 § 1 (right to life) – following the coming into force of Protocol 6 in 1999 and Protocol 13 in 2002, abolishing the death penalty, this Article should now read as though the second sentence stopped at the word "intentionally".

Intentional deprivation of life is in principle not permitted in any circumstances. However, the exceptions foreseen by Paragraph 2 of this Article may apply where the deprivation of life was foreseeable but not intentional.

216 *Tyrer v. the United Kingdom*, judgment of 25 April 1978, no. 5856/72, para. 31.

217 *Bayatyan v. Armenia*, [Grand Chamber] judgment of 7 July 2011, no. 23459/03, paras. 98 and 102.

218 In contrast to Protocol 6, Protocol 13 prohibits death penalty even in time of war, but not all countries have ratified it.

In deciding whether the deprivation of life has met the criteria set out in Article 2 § 2, the Court has taken a very strict approach to the phrase "no more than absolutely necessary", and has in particular been careful to examine what alternatives to the use of lethal force were available.

A violation of Article 2 may be found even when no death occurs (e.g. *Makaratzis v. Greece*[219]*; Saso Gorgiev v. the Former Yugoslav Republic of Macedonia*[220]) or in cases of forced disappearance where the body has not been found. Disappearance cases may also trigger Article 5, as well as Article 3 as regards the impact of the disappearance on the relatives (e.g. *Taş v. Turkey*[221]).

Article 3 (prohibition of torture and inhuman and degrading treatment or punishment) is short and simple (for definition of the terms "torture", "inhuman treatment" and "degrading treatment" see Section II.i. above). Any treatment which passes the very high "threshold of severity" test is prohibited[222]. Whether or not it reaches that threshold will depend on all the circumstances of the case (see inter alia *Muršić v. Croatia*[223]), such as the duration of the treatment, physical or mental effects, and the sex, age and state of health of the victim (*Ireland v. the United Kingdom*[224]), as well the ethnicity (*Bouyid v. Belgium*[225]), in addition to the the nature and context of the treatment or punishment, and the manner and method of its execution (*Soering v. the United Kingdom*[226]).

For political reasons - it appears more unacceptable to a State to be found guilty of torture than inhuman treatment - some of the case law has devoted considerable time and intellectual energy to deciding whether the treatment in question should be classified as torture or inhuman or degrading treatment or punishment[227]. But

219 *Makaratzis v. Greece*, [Grand Chamber] judgment of 20 December 2004, no. 50385/99, para. 49.

220 *Saso Gorgiev v. the Former Yugoslav Republic of Macedonia*, judgment of 19 April 2012, no. 49382/06, para. 29.

221 *Taş v. Turkey*, judgment of 14 November 2000, no. 24396/94, paras. 79-80.

222 For an example of degrading treatment passing such test, see *Bouyid v. Belgium*, [Grand Chamber] judgment of 28 September 2015, no. 23380/09, paras. 86-88 and 100-113; the Court found that the administration of slaps by police officers to a person who is completely under their control constitutes a serious attack on their dignity and constitutes degrading treatment.

223 *Muršić v. Croatia*, [Grand Chamber] judgment of 20 October 2016, no. 7334/13, where the Court recapitulated the principles and standards for the assessment of whether insufficient personal space allocated to prisoners passes the "threshold of severity" test of Article 3 (paras. 96-141).

224 *Ireland v. the United Kingdom*, judgment of 18 January 1978, no. 5310/71, para. 162.

225 *Bouyid v. Belgium*, [Grand Chamber] judgment of 28 September 2015, no. 23380/09.

226 *Soering v. the United Kingdom*, judgment of 7 July 1989, no. 14038/88 para. 100.

227 For the meaning of each of these concepts see Section II.i.

all are ***equally absolutely prohibited***, whether administered by state officials or, in case of inhuman or degrading treatment, by private individuals,[228] or in situations where an individual will be exposed to such treatment if sent to another jurisdiction in expulsion or extradition proceedings. The same applies to Article 2 when the death penalty will be imposed on an individual if sent to another jurisdiction in expulsion or extradition proceedings or where a real risk of deliberate killing exists against such individual.

Both Article 2 and Article 3 have inherent procedural safeguards as well as substantive elements and require, *inter alia*, that any police or military operation is prudently planned and any allegations of unlawful killing or treatment prohibited by Article 3, committed either by State officials or by private persons, are properly investigated. The investigation must be effective, that is, capable of establishing the facts and identifying and, if appropriate, punishing those responsible. For more about Procedural Safeguards see below Section IV – Positive Obligations. The investigation must be both prompt and thorough, which means that the authorities must act of their own motion once the matter has come to their attention and must always make a serious attempt to find out what happened, including taking all reasonable steps available to them to secure the relevant evidence. Furthermore, the investigation should be independent of the executive, whereas the victim should be able to participate effectively in the investigation in one form or another.[229]

In a series of cases concerning extraordinary renditions, the Court has acknowledged that an aspect of the procedural limb of Article 3 also concerns the right to the truth regarding the relevant circumstances of the case, which "does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened"[230]; this constitutes another reason why the State must undertake an adequate investigation in order to prevent any appearance of impunity in respect of such acts (see *El-Masri v. the former Yugoslav Republic of Macedonia*[231]).

228 It is an open question in the Court's case-law whether individuals acting purely in their private capacity can commit torture; see *Ćwik v. Poland*, judgment of 5 November 2020, no. 31454/10, para. 83.

229 For a reiteration of the principles mentioned above, including references to the Court's case law, see, inter alia, *El-Masri v. the former Yugoslav Republic of Macedonia*, [Grand Chamber] judgment of 13 December 2012, no. 39630/09, paras. 182-185.

230 *Al Nashiri v. Poland*, judgment of 24 July 2014, no. 28761/11, para. 495.

231 *El-Masri v. the former Yugoslav Republic of Macedonia*, [Grand Chamber] judgment of 13 December 2012, no. 39630/09, paras. 191-192.

The principles regarding the requirement of an effective investigation that have been developed under Articles 2 and 3 accordingly apply to other criminal breaches of substantive rights, notably Articles 4, 5 and 8.

Article 4 (prohibition of slavery and forced labour) - only Article 4 § 1 ("No one shall be held in slavery or servitude") is absolute.

Article 4 § 1 of the Convention requires that "no one shall be held in slavery or servitude" while Article 4 § 2 of the Convention prohibits forced or compulsory labour. Human trafficking and domestic servitude also fall within the scope of Article 4 (see *Siliadin v. France*[232], as well as *Rantsev v. Cyprus and Russia*[233]). These notions have been described in more detail above in Section II.i Autonomous concepts. In *S.M. v. Croatia*,[234] the Court clarified that conduct or a situation may give rise to an issue of human trafficking under Article 4, only if all the three constituent elements of the international definition of human trafficking, under the Anti-Trafficking Convention and the Palermo Protocol, are present. These elements are **an action**, which could include the recruitment, transportation, transfer, harbouring or receipt of persons, **the means** meaning threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person), and **an exploitative purpose**, which includes at a minimum the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. Human trafficking covers both national and transnational trafficking in human beings, regardless of whether or not it is connected with organised crime. The Court also clarified that the notion of "forced or compulsory labour" under Article 4 aims to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they are related to the specific human trafficking context. However, to determine whether a particular situation involves all the constituent elements of "human trafficking" or gives rise to a separate issue of forced prostitution as a form of compulsory or forced labour is a factual question which must be examined in the light of all the relevant circumstances of a case.

Article 4 also puts positive obligations on Member States. Positive obligations have three aspects, the first two being substantive which relate to the duty of States to put in place a legislative and administrative framework and the duty to take

232 *Siliadin v. France*, judgment of 26 July 2005, no. 73316/01.

233 *Rantsev v. Cyprus and Russia*, judgment of 7 January 2010, no. 25965/04.

234 *S.M. v. Croatia*, [Grand Chamber] judgment of 25 June 2020, no. 60561/14, paras. 290-303.

preventive operational measures and the third being procedural, namely the duty to investigate.[235]

Article 7 (no punishment without law) – Although Article 7 is an absolute right, the Court has held that it does not preclude gradual clarification and development through judicial practice, consistent with the essence of the offence and where the development of the law is reasonably foreseeable. This principle was affirmed in *S.W. v. the United Kingdom*[236] where the Court recognised that this Article cannot be read as outlawing the gradual clarification of the rules of criminal liability for marital rape through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen. The Court has used the same criteria that it uses when it needs to determine whether an interference with Articles 8-11 is sufficiently prescribed in law (see below).

Article 7 has been interpreted to guarantee that "where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant" (*Scoppola v. Italy (No. 2)*[237]).

2. Qualified rights

These rights may be interfered with but only when there is a legitimate aim of those identified in the Articles and the interference is proportionate to that specific aim. These are: right to respect for family and private life, home and correspondence (**Article 8**), right to freedom of thought, conscience and religion (**Article 9**), freedom of expression (**Article 10**), freedom of assembly and association (**Article 11**) and the right to peaceful enjoyment of possessions (**Article 1 of Protocol No. 1**). Articles 8-11 have a uniform structure. They all consist of two paragraphs. The first paragraph defines the rights protected whereas the second paragraph sets out permissible limitations, which require a balancing exercise against the interests expressly foreseen therein to be conducted. The balancing of rights has been discussed in more detail in Section VI below.

In considering whether there has been a violation of these rights, the Strasbourg organs have to balance these rights against the backdrop of other interests involved. The test for this balancing exercise includes the following questions:

235 *Ibid*., paras. 304-306.

236 *S.W. v. the United Kingdom*, judgment of 22 November 1995, no. 20166/92, paras. 36 and 41-43.

237 *Scoppola v. Italy (No. 2)*, [Grand Chamber] judgment of 17 September 2009, no. 10249/03, para. 109.

1. Do the facts disclose an identified protected right as that right has been defined by the Court?

2. Has there been an interference with the protected right, or is such an interference proposed?

3. Was/is that interference prescribed by a law meeting the quality of law test?[238]

4. Did/would the interference pursue an identified legitimate aim? Here, check the aims permitted by each Convention Article.

5. Was the interference necessary in a democratic society as proportionate to the legitimate aim pursued? Or, will it be?[239]

If the answers to questions 1 and 2 are YES, but the answer to *any* (or a fortiori all) of questions 3, 4, 5 is NO, there will have been a violation.

Article 1 Protocol 1 (peaceful enjoyment of possessions[240]) - The structure of Article 1 of Protocol No. 1 is somewhat different from Articles 8-11. The first sentence of the first paragraph guarantees the right to the peaceful enjoyment of possessions. The second sentence of the first paragraph, however, allows States to deprive a person of their possessions under certain conditions. The second paragraph, likewise, entitles States to control the use of property under certain conditions. However, the first sentence of the first paragraph contains an inherent limitation. Therefore, the Court has held that this Article comprises three distinct but connected rules (see, *inter alia*, *Sporrong and Lonnroth v. Sweden*[241]; *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*[242]): the general principle of peaceful enjoyment of possessions and two rules concerning particular instances of interference with the right to peaceful enjoyment of property (deprivation of possessions and control on the use of property).

The structure of the Article and the interconnection of its three rules have informed the Court's approach when examining a complaint under any of the rules

238 For the Convention meaning of the "quality of law" see above Section II.ii.

239 For the principle of proportionality also see below in Section IV.

240 See Section II.i. above for the definition of the concept of "possessions".

241 *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, nos. 7151/75 and 7152/75, para. 61.

242 *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, judgment [Grand Chamber] of 16 July 2014, no. 60642/08, para. 98.

of this Article (see for example *The Holy Monasteries v. Greece*[243]; *Broniowski v. Poland*[244]; *Chassagnou and Others v. France*[245]). Accordingly, any type of interference with the peaceful enjoyment of possessions needs to fulfil the following principles: (i) the principle of lawfulness – the interference must be provided for by "law" in the meaning of the Convention; (ii) the interference must pursue a legitimate aim "in the public interest" or "in the general interest". The national authorities enjoy a wide margin of appreciation as they have direct knowledge of their society and its needs when implementing social and economic policies; as a result, the Court's examination is limited to reviewing whether the national authorities' judgment as to what is "in the public interest" has been manifestly without reasonable foundation; (iii) there must be a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's right to peacefully enjoy their possessions.

3. Rights relating to the administration of justice

These are: the right to liberty and security (**Article 5**), the right to a fair trial (**Article 6**), no punishment without law (**Article 7**)[246], the right of appeal in criminal matters (**Article 2 of Protocol 7**), and the right not to be tried or punished twice (**Article 4 of Protocol 7**).

Article 5 (right to liberty and security) - the key principle underlying this Article is the observance of the rule of law.[247] The list of instances of lawful deprivation of liberty set out in Article 5 § 1 is exhaustive. Detention will be unlawful unless it is for one of the specified reasons and clearly authorised by an identifiable provision of national law.

Article 5 § 4 affords the arrested or detained person the right to have the lawfulness of the deprivation of liberty reviewed speedily by a court that has the competence to order release if the detention is unlawful. The review does not extend to all aspects of the case but it should be wide enough to cover the procedural and substantive conditions that are essential for the "lawfulness", in Convention terms, of the deprivation of liberty. This includes examining "compliance with the procedural

243 *The Holy Monasteries v. Greece*, judgment of 09 December 1994, nos. 13092/87 and 13984/88, para. 56.

244 *Broniowski v. Poland*, [Grand Chamber] judgment of 22 June 2004, no. 31443/96, para. 134.

245 *Chassagnou and Others v. France*, [Grand Chamber] judgment of 29 April 1999, nos. 25088/94, 28331/95 and 28443/95, para. 75.

246 A brief comment on Article 7 has been included above in the section regarding absolute rights.

247 *S., V. and A. v. Denmark*, [Grand Chamber] judgment of 22 October 2018, nos. 35553/12, 36678/12 and 36711/12, para. 73.

requirements of domestic law as well the reasonableness of the suspicion underpinning the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention"[248].

Article 5 § 5 (compensation for victims of unlawful arrest or detention) and **Article 3 Protocol 7** (compensation for wrongful conviction) are the only places where the Convention stipulates that national law must provide compensation.

Article 6 (right to a fair trial) - this right only applies to the determination of civil rights and/or criminal charges as those concepts have been elaborated on by the Court (see Section II.i. above.). It does not apply automatically to all court proceedings concerning redress for alleged violations of Convention rights. It includes the right of access to court and sets out the safeguards which will ensure a fair trial. The rights are not absolute. Access to court, for example, may be restricted by procedural bars or limitation periods. Any limitations must not, however, restrict or reduce a person's access to such an extent that the very essence of the right is impaired (see, for example, *Marini v. Albania*[249]). The right to legal aid (as opposed to legal representation) is only guaranteed in both civil and criminal proceedings where the "interests of justice so require". Denial of access to legal representation in criminal proceedings requires a much more stringent test (see *Ibrahim and Others v. the United Kingdom*[250]). Denial of access to a lawyer of the defendant's own choosing may also amount to a violation of the right to a fair hearing, when such restriction is made without "relevant and sufficient" reasons and affects the overall fairness of the proceedings (*Dvorski v. Croatia*[251]).

A word of warning must be given about Article 6 case law. Since - by definition - no complaint will be admissible in Strasbourg unless all domestic remedies have been exhausted, almost all cases alleging violations of Article 6 will have proceeded to the highest national courts before reaching Strasbourg. The Court will frequently find

248 For a reiteration of the principles regarding Article 5(4), see *Khlaifia and Others v. Italy*, [Grand Chamber] judgment of 15 December 2016, no. 16483/12, paras. 128-131.

249 *Marini v. Albania*, judgment of 18 December 2007, no. 3738/02, paras. 113 & 122. The Court held that the right to court includes the right to have a final determination on a matter submitted to a court (para. 120); the Constitutional Court's failure to reach a majority on the proposals before it restricted the essence of the applicant's right under Article 6(1).

250 *Ibrahim and Others v. the United Kingdom*, [Grand Chamber] judgment of 13 September 2016, nos. 50541/08 and others, paras. 255-265, where the Court clarified the principles applicable to the test of the two stages assessment previously laid down in *Salduz v. Turkey*, [Grand Chamber] judgment of 27 November 2008, no. 36391/02.

251 *Dvorski v. Croatia*, [Grand Chamber] judgment of 20 October 2015, no. 25703/11, paras.79-80.

no violation of Article 6 because it considers that the proceedings "taken as a whole" were fair and that the higher court was able to rectify the errors of the lower courts. Judges sitting in lower courts may hence erroneously be persuaded that because a particular procedural defect was not found to be a violation of the Convention by the Strasbourg organs, it complies with Convention standards.

Article 2 of Protocol 7 (right of appeal in criminal matters) - This guarantees a right to have a criminal conviction or sentence "reviewed" by a higher tribunal. The Article does not guarantee a right to an appeal on the merits of a judgment and the States have a wide margin of appreciation to determine how it is to be exercised - any limitations though must pursue a legitimate aim and not infringe the very essence of the right. The review may therefore concern both points of fact and points of law or be confined solely to points of law (*Krombach v. France*[252]). The term "tribunal" has the same autonomous meaning as in Article 6 § 1 (see Section II.i. above).

Article 4 of Protocol 7 (right not to be tried or punished twice) - The Article contains three distinct guarantees: no one shall be (i) liable to be tried, (ii) tried or (iii) punished in criminal proceedings for the same offence, irrespective of whether the proceedings have resulted in a conviction or acquittal. It applies to judgments that are final, that is, those that have acquired the force of *res judicata*.

In the Grand Chamber judgment in case *Mihalache v. Romania*[253], the Court pointed out that the "*ne bis in idem*" principle reflected in Article 4 of Protocol No. 7 has three elements. First, both sets of proceedings have to be criminal in nature. Second, both sets of proceedings have to concern the same facts. The third, there has to be duplication of proceedings. For the determination of whether the proceedings in question can be regarded as "criminal" in the context of this Article, the Court applies *the three Engel criteria* previously developed for the purposes of Article 6 (see above in Section II.i. under the concept "criminal"). What constitutes a different "offence" is not to be determined by the legal characterisation of the offences in question; it would be the same offence in so far as it arises from identical facts or facts which are substantially the same (see *Sergey Zolotukhin v. Russia*[254], where the Court harmonised its previous approaches primarily on the matter of what constitutes *idem* in the *ne bis in idem* principle laid down in this Article[255]). In *A and B v. Norway*[256], the Court examined its previous case law predominantly on the issue of what constitutes *bis* in

252 *Krombach v. France*, judgment of 13 February 2001, no. 29731/96, para. 96.

253 *Mihalache v. Romania*, [Grand Chamber] judgment of 8 July 2019, no. 54012/10, para. 49.

254 *Sergey Zolotukhin v. Russia*, [Grand Chamber] judgment of 10 February 2009, no. 14939/03.

255 Ibid.paras. 78-84.

256 *A and B v. Norway*, [Grand Chamber] judgment of 15 November 2016, nos. 24130/11 and 29758/11.

the above principle, that is, on the question of whether the proceedings have been duplicated. It concluded that Article 4 of Protocol 7 does not preclude the conduct of parallel proceedings, which are aimed to address different aspects of the social problem involved (for example, imposition through administrative proceedings of tax penalties and criminal persecution for fraud because of tax evasion, which was the issue in this case). The respondent State must, however, demonstrate that the dual proceedings in question have been "sufficiently closely connected in substance and in time", having been combined in a foreseeable and proportionate manner so as to form a coherent whole[257].

Paragraph 2 of this Article provides for the possibility that a case is re-opened in accordance with domestic law following the emergence of new evidence or the discovery of a fundamental defect in the previous proceedings. In *Marguš v. Croatia*[258] the Court held that Article 4 of Protocol 7 did not apply to the termination of criminal proceedings on the basis of an amnesty for acts which amounted to grave breaches of fundamental rights, such as war crimes against the civilian population. The Court's reasoning was that to grant amnesty for acts involving killing and ill-treatment of civilians would run contrary to the State's obligations under Articles 2 and 3 of the Convention. The Court also pointed to a growing tendency in international law to see the granting of amnesties in respect of grave breaches of human rights as unacceptable. Therefore, bringing a fresh indictment against a person who has been granted an amnesty for these acts should not fall within the ambit of Article 4 of Protocol No. 7.

4. Rights with inherent restrictions

These rights do not include a specific provision permitting interferences, as is found in the substantially qualified rights, but the Court has accepted that there is room for implied restrictions. These rights are: the right to marry (**Article 12**), right to education (**Article 2 of Protocol 1**) and right to free elections (**Article 3 of Protocol 1**).

Article 12 (right to marry) – the wording suggests that any interference is acceptable if it is prescribed by national law, but the Convention organs have held that it must not "impair the very essence of the right". The scope of the right to marry is examined above in the section regarding the autonomous concepts (Section II.i.).

257 Ibid. paras. 130 – 134, where the Court explains the factors that determine whether the proceedings are sufficiently closely connected.

258 *Marguš v. Croatia*, [Grand Chamber] judgment of 27 May 2014, no. 4455/10, paras. 124-141.

Article 2 Protocol 1 (right to education) - This Article guarantees a right of access to educational institutions existing at a given time. In a democratic society, this right which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence would not be consistent with the aim and purpose of the provision (see e.g. *Leyla Sahin v. Turkey*[259], *Timishev v. Russia*[260] and *Velyo Velev v. Bulgaria*[261]). It imposes on States the obligation to provide effective access to such establishments, which means, *inter alia*, that the individual who is the beneficiary should have the possibility of drawing profit from the education received (*Belgian linguistic case*[262]). Seen in conjunction with Article 14, there may be some positive obligations for the State (for example, in *Oršuš and Others v. Croatia*[263] the Court observed that a high drop-out rate of Roma pupils at a particular County in Croatia called for the implementation of positive measures).

All levels of education are covered but there is a wider margin of appreciation recognised as we move from primary to higher education (*Ponomaryovi v. Bulgaria*[264]). The sole reference to the margin of appreciation points to the fact that this Article is not absolute. It contains implicitly accepted limitations, bearing in mind that "it by its very nature calls for regulation by the State"[265]. As a result, the domestic authorities enjoy a certain margin of appreciation in this respect.

In order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim.[266] Unlike the position with respect to Articles 8 to 11 of the Convention, the permitted restrictions are not bound by an exhaustive list of "legitimate aims" under Article 2 of Protocol No. 1. The restrictions concern the language in which the education is conducted[267], the admission criteria[268] and

259 *Leyla Şahin v. Turkey*, [Grand Chamber] judgment of 10 November 2005, no. 44774/98, para. 137.

260 *Timishev v. Russia*, judgment of 13 December 2005, nos. 55762/00 and 55974/00, para. 64.

261 *Velyo Velev v. Bulgaria*, judgment of 27 May 2014, no. 16032/07, para. 33.

262 *Case relating to certain aspects of the laws on the use of languages in education in Belgium, "Belgian linguistic case"*, judgment of 23 July 1968, nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64.

263 *Oršuš and Others v. Croatia*, [Grand Chamber] judgment of 16 March 2010, no. 15766/03, para. 177.

264 *Ponomaryovi v. Bulgaria*, judgment of 21 June 2011, no. 5335/05, para. 56.

265 *The Belgian linguistic case*, [Plenary Court] judgment of 23 July 1968, nos. 1474/62 and 5 others, para 5 of "the Law".

266 *Leyla Şahin v. Turkey*, [Grand Chamber] judgment of 10 November 2005, no. 44774/98, para. 154.

267 *The Belgian linguistic case*, judgment of 23 July 1968, nos. 1474/62 and others, para. 3 of the Law part; however, in this part the Court also added that this right would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages.

268 *Kiliç v. Turkey*, decision of 5 March 2019, no. 29601/05, paras. 23-34.

entrance examinations[269], school fees,[270] the acquisition of nationality[271], minimum age requirement to attend education[272], organisation of particular type of education in prisons[273], exclusion from a secondary school pending lengthy criminal investigation[274], the discontinuance of education following a deportation,[275] the application of disciplinary measures, such as suspension or expulsion from a school to ensure compliance with internal rules.[276] However, the restrictions must be foreseeable for those concerned and pursue a legitimate aim, Furthermore, a limitation of the right to education will only be compatible with Article 2 of Protocol No. 1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[277]

Article 3 Protocol 1 (right to free elections) - In determining compliance of a State's interference with this right, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. The Article contains an active aspect (right to vote) and a passive one (right to stand for election). The Court follows a stricter approach when it examines restrictions on the right to vote rather than on the right to stand for election where a wider margin of appreciation seems to be afforded to the States (*Zdanoka v. Latvia*[278]).

IV. POSITIVE OBLIGATIONS

The Convention largely protects individuals from interferences by the State with their fundamental rights. It thus imposes negative obligations on States to refrain from such interferences. However, Article 1 also demands that States "secure" the rights. The Court has therefore held in many cases that States are under a positive obligation to take steps to ensure that Convention rights are protected, not just to refrain from negative interferences. These positive obligations can take many forms; these may be grouped in two main types: a) substantive positive obligations, which concern the substantive measures that the State must put in place in order to secure

269 *Tarantino and Others v. Italy*, judgment of 2 April 2013, nos 25851/09, 29284/09 and 64090/09, paras. 47-54.

270 *Ponomaryovi v. Bulgaria*, judgment of 21 June 2011, no. 5335/05, para. 54.

271 Ibid.para. 52.

272 *Çiftçi v. Turkey*, decision of 17 June 2004, no. 71860/01.

273 *Epistatu v. Romania*, decision of 24 September 2013, no. 29343/10, paras. 61-67.

274 *Ali v. the United Kingdom*, judgment of 11 January 2011, no. 40385/06, para. 59-60.

275 *Sorabjee v. the United Kingdom*, decision of 23 October 1995, no. 23938/94, para. 3 of the Law part.

276 *Çölgeçen and Others v. Turkey*, judgment of 12 December 2017, nos. 50124/07 and others, para. 50.

277 Supra note 268.

278 *Zdanoka v. Latvia*, [Grand Chamber] judgment of 16 March 2006, no. 58278/00, para. 115.

that anyone in their jurisdiction fully enjoys the Convention rights and freedoms (e.g. adopting legislation that prohibits, say, forced or compulsory labour), and b) procedural, which concern the procedures that the State must have in place in order to respond to any alleged violation (e.g. carry out an adequate and effective investigation when a violation of a Convention right is alleged).

The most obvious form of a State's positive obligations is that contained in Article 13 to provide an effective remedy before a national authority for any violations of the protected rights.

Article 1 also demands that a judicial sanction must exist to protect certain rights and in some cases the Court has gone so far as to state that this must be a criminal sanction (*X and Y v. the Netherlands*[279]). At very least a State must have in place laws which ensure that Convention rights are adequately protected from infringements both by State officials and private individuals.

The State is also under a duty to have allocated sufficient resources to its justice system to ensure that judicial proceedings are dealt with expeditiously (*Guincho v Portugal*[280]). But the positive obligations go further than this.

The State must also take active steps to ensure that individuals can exercise their Convention rights in practice. In *Artze fur das Leben v. Austria*[281] the Court held that, not only was the State obliged under Articles 10 and 11 to permit a demonstration to take place, but it was also obliged to protect the demonstrators from the actions of counter demonstrators. The Court set out in the case of *Osman v. the United Kingdom*[282] a test which has since been applied many times: **"Did the State take all reasonable steps to protect an individual from harm of which it knew or ought to have known?"**[283] In this case the Court establihsed that where there is an allegation that the authorities have violated their positive obligation to protect the right to life, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an

279 *X and Y v. the Netherlands*, judgment of 26 March 1985, no. 8978/80, para. 27.

280 *Guincho v. Portugal*, judgment of 10 July 1984, no. 8990/80, para. 40.

281 *Plattform "Ärzte für das Leben" v. Austria*, judgment of 21 June 1988, no. 10126/82, para. 32.

282 *Osman v. the United Kingdom*, [Grand Chamber] judgment of 28 October 1998, no. 23452/94.

283 Ibid..para. 116.

applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.[284] Since the *Osman* case the Court has held that the obligation is broader and applies to the foreseeable criminal acts of a third party, without having to identify the individuals at risk (*Mastromatteo v. Italy*[285]).

Hoffmann v. Austria[286] concerned a private law child custody dispute between parents. The Austrian Government maintained that it was therefore not responsible for the result of the legal dispute which was a purely private matter. The Court disagreed, holding that the State was responsible **through its courts** for providing the necessary protection for Convention rights where their enjoyment is affected by disputes between private persons[287].

V. PROPORTIONALITY

There are several invisible provisions of the Convention - concepts and rights which are not to be found expressly anywhere in the wording of the text but which have become over the years an integral part of Convention law. Of these, **proportionality** is the most significant and is at the heart of all justification for interferences with Convention rights.

There are a number of key tests which can be applied to any Convention question:

1. Have "relevant and sufficient reasons" been advanced for any interference with a Convention right? Is it "necessary in a democratic society"? Does it correspond to a "pressing social need"?

2. Is there an alternative action which would have interfered less? Has it been considered? Have relevant and sufficient reasons been given for rejecting it?

3. Were procedural safeguards both in place and observed so as to avoid the possibility of abuse?

4. Does the interference operate so as to "impair the very essence of the right"?

284 Ibid., para. 116.

285 *Mastromatteo v. Italy*, [Grand Chamber] judgment of 24 October 2002, no. 37703/97.

286 *Hoffmann v. Austria*, judgment of 23 June 1993, no. 12875/87.

287 Ibid.paras. 32-36.

V. THE BALANCING OF RIGHTS

The Court established in its case-law that 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'. This is needed when there are multiple competing Convention rights.

In many situations the balancing act that has to be carried out will be between the Convention rights of two or more individuals. Under Articles 8-11, it may be that the Convention right, e.g. right to privacy, or to a good reputation under Article 8, of one person has to be balanced against the Convention right to freedom of expression under Article 10 of another (e.g. *Von Hannover v. Germany (No. 2)*[288] and *Axel Springer AG v. Germany*[289]). Sometimes it is the interests of the community as a whole which have to be balanced against the rights of an individual.

Where domestic courts have undertaken a balancing act between two rights in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to set aside the balancing done by them (e.g. *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*[290]).

Articles 17 and 18 set out some general principles in this context**.** These provisions have been discussed in more detail in Section II.i. on Autonomous Concepts.

VI. PROHIBITION OF DISCRIMINATION

There is no freestanding prohibition on discrimination in the main body of the ECHR. **Article 14** (prohibition of discrimination) does not provide for a general prohibition, but only for a prohibition of discrimination in respect of the rights guaranteed in the Convention. The Court has in fact stated that it is as though Article 14 formed an integral part of each of the Articles laying down rights and freedoms (*Belgian Linguistic case*[291]). However, there can be a violation of Article 14 even if

288 See *Von Hannover v. Germany (No. 2)*, [Grand Chamber] judgment of 7 February 2012, nos. 40660/08 and 60641/08.

289 *Axel Springer AG v. Germany*, [Grand Chamber] judgment of 7 February 2012, no. 39954/08.

290 *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [Grand Chamber] judgment of 27 June 2017, no. 17224/11, para. 121, with reference to *Von Hannover v. Germany (No. 2)*, [Grand Chamber] judgment of 7 February 2012, nos. 40660/08 and 60641/08.

291 *Case relating to certain aspects of the laws on the use of languages in education in Belgium, "Belgian linguistic case"*, judgment of 23 July 1968, nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64.

there is no violation of the substantive right as long as the subject matter falls within the *ambit* of the substantive right (see for example *Kafkaris v. Cyprus*[292]; *Thlimmenos v. Greece*[293]; *Sejdic and Finci v. Bosnia and Herzegovina*[294]; and *Burden v. the United Kingdom*[295]).

Article 1 of Protocol 12 provides a wider prohibition on discrimination in relation to any right "set forth in law". It came into force in April 2005. However, Protocol 12 still does not prohibit all forms of discrimination but only in relation to rights "set forth in [national] law".[296]

The Court follows the same definition of discrimination for both Articles: discrimination means treating differently persons in similar situations without an objective and reasonable justification. "No objective and reasonable justification" means that the differentiation in treatment does not pursue a legitimate aim or that it is not proportionate.

In determining whether or not Article 14 or Protocol 12 has been violated the Court asks:

1. Is there a difference in treatment? (like must be compared with like)

2. Is it based on the characteristic identified? (sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status)

3. Is the difference in treatment based on objective and reasonable justification? That is to say, does it pursue a legitimate aim and is it proportionate?

292 *Kafkaris v. Cyprus*, [Grand Chamber] judgment of 12 February 2008, no. 21906/04, para. 159.

293 *Thlimmenos v. Greece*, [Grand Chamber] judgment of 6 April 2000, no. 34369/97, para. 40.

294 *Sejdic and Finci v. Bosnia and Herzegovina*, [Grand Chamber] judgment of 22 December 2009, nos. 27996/06 and 34836/06, para. 39.

295 *Burden v. the United Kingdom*, [Grand Chamber] judgment of 29 April 2008, no. 13378/05, para. 58.

296 According to the Explanatory Report on Protocol 12, at para. 22: *In particular, the additional scope of protection under Article 1 concerns cases where a person is discriminated against: i. in the enjoyment of any right specifically granted to an individual under national law; ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner; iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies); iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).*

The Court has not only found that like should be treated alike, but that discrimination occurs in situations where people who should be treated differently are treated the same without an objective and reasonable justification (e.g. *Thlimmenos v. Greece*[297]).

The Court has also considered that discrimination contrary to the Convention may result not only from a legislative measure, but also from a *de facto* situation resulting from a well-established practice (e.g. *Zarb Adami v. Malta*[298]).

A person can be a victim of discrimination on the basis of another persons' protected status or characteristics (see, for example, *Škorjanec v. Croatia*[299], where the applicant had been targeted as the partner of a man of Roma origin, and *Guberina v. Croatia*[300], in which case the applicant had suffered less favourable treatment by the tax authorities on grounds relating to the disability of his child).

297 *Thlimmenos v. Greece*, [Grand Chamber] judgment of 6 April 2000, no. 34369/97, para. 44.

298 *Zarb Adami v. Malta*, judgment of 20 June 2006, no. 17209/02, para. 76.

299 *Škorjanec v. Croatia*, judgment of 28 March 2017, no. 25536/14, paras. 55-56.

300 *Guberina v. Croatia*, judgment of 22 March 2016, no. 23682/13, paras. 76-79.

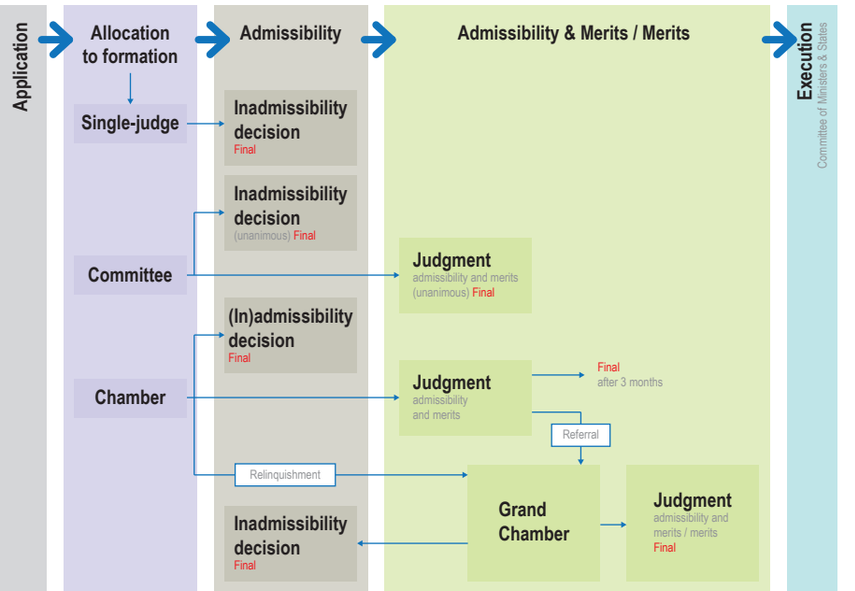
Chapter 3
Short guide to the system of the ECtHR

This chapter provides an overview of the way the system of the Court's deliberation works, from the moment an application is filed until after a final judgment is delivered. Its aim is not to provide a thorough presentation of the procedure before the Court, but rather to make the reader familiar with the main tools of the Court's deliberation and facilitate the use of its decisions and judgments in the domestic legal order. Thus, the first subpart provides an outline of an application's path, whereas more attention has been given to the second and third subparts, which present the different means of the Court's deliberation and exemplify the importance of the stage starting after a judgment respectively.

I. AN APPLICATION'S PATH

Individual applications are made under Article 34 of the Convention and must be submitted in writing. The application should be made using the Court's application form, and the process should follow the procedure laid down in Rule 47 of the Rules of the Court, which stipulates certain criteria for the contents of the individual application. A critical point to note is the requirement for a legal statement confirming the applicant's compliance with the admissibility criteria laid down in Article 35 § 1 of the Convention. The information supplied should be sufficient to enable the Court to determine the nature and scope of the application without recourse to any other documents. Failure to comply with the Rule 47 procedure may result in the application not being examined by the Court, being declared inadmissible or struck out from the Court's list of cases.

After an application is filed with the Registry, the case is allocated to a judicial formation, either a single-judge formation or a Committee or a Chamber depending on the circumstances (see section II below), which will decide on the application's admissibility. Nowadays, the admissibility and the merits of an application are most often examined and decided together; thus, a decision purely on admissibility is in almost all cases a simple decision to declare the case inadmissible unless the case raises an important issue about admissibility (e.g. *Banković and Others v. Belgium and Others*[301]). Unless a friendly settlement is reached or a Committee of 3 judges delivers a judgment on the merits (see section II below), a Chamber of the Court will go on to examine the case. The Chamber will deliver its judgment unless it relinquishes its jurisdiction to the Grand Chamber under Article 30 (see section II below). The parties have the right to request referral of a case to the Grand Chamber within a period of 3 months from the date of the delivery of the judgment of a Chamber. If such request is accepted, the Grand Chamber examines the case and delivers a final judgment. Final judgments are transmitted to the Committee of Ministers of the Council of Europe (hereafter, "Committee of Ministers"), which is responsible for supervising their execution by the respondent State (Article 46(2))[302].



II. THE COURT'S VOICE

i. Tools of judicial deliberation

From the time an application is allocated to a formation, the Court, in each different formation depending on the circumstances of the case and the stage of the proceedings, will rule on the admissibility and, where appropriate, the merits of an application, using the following tools of deliberation:

301 *Banković and Others v. Belgium and Others*, [Grand Chamber] decision of 12 December 2001, no. 52207/99.

302 The Committee of Ministers is the Council of Europe's statutory decision-making body and is made up of representatives of the governments of the 46 Member States. Its powers regarding the supervision of the execution of the Court's judgments are governed by the "Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements", hereafter "Rules of the Committee". In this task, the Committee is assisted by the Department for the Execution of Judgments of the Court.

a. Decisions: admissibility

The Court rules on the admissibility of a case by means of a *decision*. Decisions on inadmissibility are **final**.

The admissibility criteria are set out in Article 35 and include the exhaustion of all domestic remedies and a time limit of four months[303] from the date on which the final decision was taken at the domestic level (Article 35 § 1). Further admissibility criteria are set out in paragraphs 2 and 3 as regards individual applications. These include the requirement that an application is not anonymous and that it has not previously been examined by the Court or already submitted to another international body unless it contains relevant new information. Furthermore, an application shall not be incompatible with the provisions of the Convention or the Protocols, manifestly ill-founded or an abuse of the right of individual application. The Court usually makes a specific statement regarding the question of whether an application as a whole or a particular complaint is manifestly ill-founded. This is largely a question as to whether, following a preliminary assessment of the substance of the case, there is no appearance of a violation and thus no need for further examination on the merits.

Protocol 14 added a second limb to paragraph 3 of Article 35; which introduced a further admissibility criterion requiring that the applicant has suffered a significant disadvantage (Article 35 § 3 (b). This was inspired by the principle *de minimis non curat praetor* and based on "the idea that a violation of a right should attain a minimum level of severity to warrant consideration by an international Court" (*Korolev v. Russia*)[304]. Two "safeguard clauses"[305] were originally included in that limb to ensure that, even where the applicant has not suffered a significant disadvantage, the Court goes on to examine the merits of the case: (i) if respect for human rights as defined in the Convention and the Protocols thereto requires it to do so, or (ii) if the application has not been duly considered by a domestic tribunal. However, the second proviso has been removed following the entrance of Protocol 15 into force.

The competence of the Court *ratione personae, ratione materiae, ratione loci and ratione temporis* (see Chapter 1) is examined as part of the admissibility of a case, namely in respect of the criterion included in Article 35 § 1 (a) concerning the compatibility of the application with the provisions of the Convention or the Protocols thereto.

Note that if a friendly settlement is effected, the Court also strikes the case out by means of a *decision* (Article 39).

Competence to deliver a decision:

- **A single-judge formation**: inadmissibility of an individual application may be declared when it is obvious without further examination of the case (Article 27), for example, when it is clear that domestic remedies have not been exhausted. These decisions are not published; the applicant is informed by letter without details of the reasons for the decision. If the application is not obviously inadmissible, the judge refers the case to a three-judge Committee or a Chamber; they do not have the power to declare the application admissible by themselves.

- **Committees of 3 judges**: inadmissibility of an individual application may be declared by a unanimous vote, where such decision can be taken without further examination (Article 28 § 1 (a)). If the Committee cannot reach a unanimous vote, the case is referred to a Chamber.

- **A Chamber (7 judges)**: With regard to individual applications, if no decision is taken under Article 27 or 28 by the above Court formations, or no judgment rendered under Article 28 by a Committee (see below), a Chamber consisting of seven judges shall decide on the admissibility of an individual application; it usually decides on the admissibility and the merits together, but it has the power to do so separately. The Chamber is competent to decide on the admissibility of inter-State applications as well; in such cases, it decides on admissibility separately unless it decides, in exceptional cases, otherwise.

- **Grand Chamber (17 judges)**: When the Grand Chamber has assumed jurisdiction over a case (see below at the part regarding judgments) it may itself deliver a decision on the application's admissibility, as under Article 35(4) applications may be dismissed as inadmissible "at any stage of the proceedings".

303 The time limit was shortened from six months to four following the entry into force of Protocol 15. The Explanatory Report to Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, references the development of swifter communications technology as justification for the reduction, along with the fact time limits of similar length are in force in the Member States.

304 *Korolev v. Russia*, decision of 1 July 2010, no. 25551/05, p.4.

305 Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention.

b. Judgments: merits

The Court rules on the merits of a case by means of a *judgment*.

Competence to deliver a judgment:

- **Committees of 3 judges**: they may render a judgment on the merits of a case stemming from an individual application, if the underlying question in the case is already the subject of well-established case law of the Court (Article 28(1)b). For example, imprisonment of persons who have been remanded or detained pending expulsion in police stations for between one and three months has repeatedly been considered contrary to Article 3 due to the nature of police stations per se (e.g. *Iatropoulos and Others v. Greece*)[306]. The judgments of the Committees are final.

- **A Chamber (7 judges)**: delivers judgments on the merits of individual and inter-state applications. The parties have 3 months following the delivery of a Chamber judgment to request referral of the case to the Grand Chamber for fresh consideration. Requests for referral to the Grand Chamber are examined by a panel of judges which decides whether or not referral is appropriate (Article 43). The judgment becomes final under the conditions of Article 44(2).

- **Grand Chamber (17 judges)**: delivers judgments when a Chamber has relinquished jurisdiction under Article 30 (serious questions are raised or issues of inconsistency with previous case-law may arise) or when the case has been referred to it following a party's request under Article 43. The judgments of the Grand Chamber are final.

c. Pilot Judgments: repetitive or clone cases

The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications[307]. The Court examines one or more of these applications, whereas the examination of the rest of the cases is adjourned. In its judgment, the Court calls on the State concerned to bring the domestic legislation into line with the Convention, indicating the general measures to be taken.

306 *Iatropoulos and Others v. Greece*, (First Section Committee) judgment of 20 April 2017, no. 23262/13, para. 38.

307 See Rule 61 of the Court.

ii. Advisory opinions

Advisory opinions may according to Article 47 be solicited by the Committee of Ministers, concerning the interpretation of the Convention and Protocols. So far under this procedure, the Court has issued opinions on certain legal questions concerning the list of candidates submitted with a view to election of judges to the Court. In addition, under Protocol 16 which entered into force in 2018, the highest courts and tribunals of a State Party which has ratified the protocol have the possibility to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms of the Convention. A request may only be made in respect of a pending case and cannot be made in the abstract.[308] [309]

III. AFTER THE JUDGMENT

i. The legal obligation of States to execute the Court's judgments

The final judgments of the Court are binding for the respondent State, that was a party to the case (Article 46 § 1). Formally, only the respondent State is bound by the obligation to abide by and execute a final judgment, however it is important that other States draw conclusions from a judgment issued against another State if they face a similar problem, so that they avoid being eventually found in breach of the Convention themselves (see section IV of the handbook).

Turning to the content of the obligation to execute a final judgment under Article 46, the Court has repeatedly held that this is not limited to paying the injured party the sums awarded by way of just satisfaction; it also includes "the obligation to take further individual and/or, if appropriate, general measures in its domestic legal

308 Protocol 16 entered into force on 1 August 2018, and had by 1 August 2021 been ratified by Albania, Andorra, Armenia, Bosnia Herzegovina, Estonia, Finland, France, Georgia, Greece, Lithuania, Luxembourg, Netherlands, San Marino, Slovak Republic, Slovenia and Ukraine.

309 See also: Article 29 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine ("Oviedo Convention") enables the Council of Europe's Committee on Bioethics to request an advisory opinion from the Court concerning legal questions that concern the Oviedo Convention's provisions. In 2021, the Court in its Decision on the Competence of the Court to give an advisory opinion under Article 29 of the Oviedo Convention, affirmed that it generally has advisory jurisdiction and competence under Article 29, however, it cannot interpret any substantive provisions or jurisprudential principles of the Convention when delivering the advisory opinion. Even though advisory opinions are non-binding in nature, a reply would still be an authoritative judicial pronouncement and would risk undermining its pre-eminent contentious jurisdiction under the Convention.

order to put an end to the violation found by the Court and to redress the effects"[310]. Accordingly, the obligation to execute a judgment includes the following:

a. The obligation to pay just satisfaction to the injured party-Article 41

Just satisfaction is determined by the Court and may be awarded in respect of:

a) pecuniary damage, which can involve compensation both for loss actually suffered and loss, or diminished gain, to be expected in the future

b) non-pecuniary damage

c) costs and expenses that the injured party has incurred (both at the domestic level and in the proceedings before the Court) in trying to prevent the violation from occurring, or in trying to obtain redress therefore

b. Other individual measures

The respondent State has the obligation to put the injured party, as far as possible, in the same situation as that party was prior to the violation of the Convention (*restitutio in integrum*)[311]. To that end, further individual measures may be required in addition to the award of just satisfaction. Individual measures, as well as general measures (mentioned below) are usually determined at the stage of the judgment's execution under the supervision of the Committee of Ministers; the Court indicates specific measures only exceptionally (see below in subpart (ii) of this section).

Examples include: "the striking out of an unjustified criminal conviction from the criminal records, the granting of a residence permit, or the reopening of impugned domestic proceedings".[312,313] Further examples are: the release of those found to be held illegally, facilitating contact between a parent and child in public care, or re-establishing parental visitation rights.

c. General measures

The State has an obligation (deriving from Article 46 § 1 and Article 1) to adopt general measures to prevent new violations similar to that or those found or to put an end to continuing violations.

Examples include: "legislative or regulatory amendments, changes of case-law or administrative practice or publication of the Court's judgment in the language of the respondent state and its dissemination to the authorities concerned"[314]. General measures may also include "practical measures such as the refurbishing of a prison, an increase in the number of judges or prison personnel or improvements in administrative arrangements"[315].

ii. Who chooses the individual and general measures?

The **respondent State** is, in principle, free to select and propose the individual and general measures it intends to adopt, provided that such means are compatible with the conclusions set out in the Court's judgment. This is done **under the supervision of the Committee of Ministers**, to which the State concerned must submit an "action plan" indicating the measures that it plans to take or that it has taken following a particular judgment of the Court. An "action report" is submitted when all measures have been taken. The supervision is concluded with the adoption by the Committee of Ministers of a final Resolution when all necessary measures have been executed[316].

The Court's role vis-à-vis the choice of the measures necessary to put an end to a violation and redress the effects thereof is **subsidiary**. In that respect, the Court has underlined that its competence under Article 41 to award sums by way of just

310 *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No 2)*, [Grand Chamber] judgment of 30 June 2009, no. 32772/02, para. 85.

311 This principle has been adopted by the Court and applied by the Committee of Ministers in several resolutions (Explanatory memorandum of the Recommendation No. R (2000) 2).

312 These examples are included in Rule 6 of the Rules of the Committee of Ministers.

313 In view of the legal difficulties arising within the various national systems as regards the re-opening of proceedings, the Committee of Ministers has adopted Recommendation No. R (2000) 2. Information concerning the possibilities within the different national systems for re-examination or reopening of cases following judgments of the Court may be found on the website of the Council of Europe: https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/echr-system/implementation-and-execution-judgments/reopening-cases.

314 These types of general measures are mentioned in Rule 6 of the Rules of the Committee of Ministers.

315 Annual Report 2007 of the Committee of Ministers regarding the Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights, p. 16. Examples of general measures suggested or adopted by particular countries following a judgment by the Court may be found in this and the other Annual Reports of the Committee of Ministers, published by the Department of the Execution of Judgments of the ECtHR (https://www.coe.int/en/web/execution/annual-reports).

316 For an overview of the supervision process, see: https://www.coe.int/en/web/execution/the-supervision-process.

satisfaction is meant to provide reparation solely for damage that cannot otherwise be remedied (*Scozzari and Giunta v. Italy*[317]).

In certain circumstances, however, the Court has moved on to indicate the type of measures to be adopted, namely in cases of systemic problems (for example, in the case of *Suljagić v. Bosnia and Herzegovina*[318], which concerned the issue of foreign currency deposited before the dissolution of the Socialist Federal Republic of Yugoslavia, the Court explicitly stated which measures must be adopted: issuing government bonds and paying any outstanding instalments as well as default interest in the event of late payment within six months of the Court's final judgment[319] - see also *Manushaqe Puto and Others v. Albania*[320]). In certain other cases, the Court has stressed that the nature of the violation does not even leave any choice as to the measures to be taken (for example, in *Assanidze v. Georgia*[321] the Court considered that in view of the urgent need to put an end to the violation of Article 5 § 1 and Article 6 § 1 the applicant's release must be secured at the earliest possible date[322])[323].

iii. Further detail on the procedure to be followed and the role of the Department for the Execution of Judgments

The Department for the Execution of Judgments of the Court ("Execution Department") assists the Committee of Ministers in the supervision of the execution of judgments. The Execution Department consists of lawyers and specialist advisors, and forms part of the Directorate General of Human Rights and Rule of Law.[324] The supervision is continuous until the relevant Contracting State provides evidence as to the required measures it has taken. Only then will the supervision be closed by a final resolution.

As mentioned previously, following the transmission of the final judgment to the Committee of Ministers, the Committee will invite the Contracting Party concerned to indicate the measures it has taken or intends to take in consequence of the judgment in an "**action plan**".[325] Contracting Parties have six months from the date of the final judgment to submit the plan. Where the six month deadline cannot be met due to the complexity of the case, the Contracting State should submit an action plan to the Committee of Ministers on the steps to be taken to determine the measures required with clear deadlines.[326]

Since January 2011, the supervision of action plans has followed a twin-track system.[327] Under this system, all cases will be examined under the **standard procedure** unless, owing to its specific nature, a case warrants consideration under the **enhanced procedure**. Cases assigned to the enhanced procedure are: judgments requiring urgent individual measures, pilot judgments, judgments raising structural and/or complex problems, or interstate cases. The standard procedure only entails the formal involvement of the Committee of Ministers at the end of the execution procedure to endorse the measures adopted by the Contracting State on the advice of the Execution Department, which will have closely cooperated with the Contracting State throughout the whole execution process.[328] The enhanced procedure involves an enhanced supervision method, involving more intensive consultations and/or enhanced technical cooperation programmes with national authorities and regular reports to the Committee of Ministers on the progress of execution.

Once all the measures have been taken, the Contracting State submits an "**action report**" to the Secretariat of the Execution Department. If the Secretariat and the Contracting State agree on the measures adopted and implemented, the Secretariat will propose that the Committee of Ministers adopt a final resolution closing the examination of the case.[329]

317 *Scozzari and Giunta v. Italy*, [Grand Chamber] judgment of 13 July 2000, no. 39221/98 and 41963/98, paras. 249-250.

318 *Suljagić v. Bosnia and Herzegovina*, judgment of 3 November 2009, no. 27912/02.

319 Ibid.para. 64.

320 *Manushaqe Puto and Others v. Albania*, judgment of 31 July 2012, nos. 604/07 and others.

321 *Assanidze v. Georgia*, [Grand Chamber] judgment of 8 April 2004, no. 71503/01.

322 Ibid.paras. 202-203.

323 See *Khodorkovskiy v. Russia*, judgment of 31 May 2011, no. 5829/04, para. 270, where the Court reiterated that it "will seek to indicate the type of measure that might be taken only exceptionally" and exemplified the types of cases that it has done so in the past.

324 See "Implementation of Judgments of the European Court of Human Rights: A Handbook for NGOs, injured parties and their legal advisors", European Implementation Network, 2018.

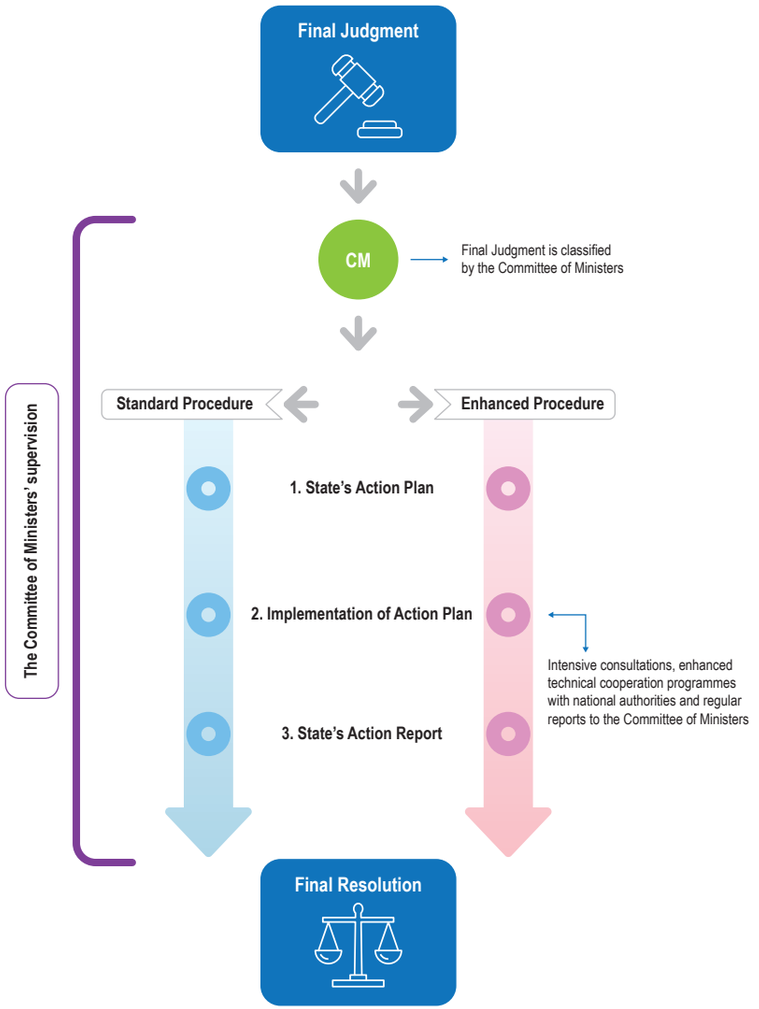
325 See "Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terns of friendly settlements", Rule 6(1), Council of Europe.

326 See https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805adb14, "Action Plans – Action Reports", Department for the Execution of Judgments of the European Court of Human Rights, 3 June 2009.

327 See "The supervision process", Council of Europe (https://www.coe.int/en/web/execution/the-supervision-process).

328 See https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d1fbd, "Supervision of the execution of the judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – elements for a roadmap", Department for the Execution of Judgments of the European Court of Human Rights, 24 June 2010.

329 See https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804a327f, "Supervision of the execution of judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – Modalities for a twin-track supervision system", Department for the Execution of Judgments of the European Court of Human Rights, 6 September 2010.



iv. The role of the ECtHR and the role of national courts after a final judgment

The Committee of Ministers is responsible for supervising the execution of the Court's judgments and for ensuring that the respondent State abides by the aforementioned obligations. The Court has the competence to deal with issues relating to the execution of a judgment only in the following cases:

a. When the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment. In that case, it may refer the matter to the Court under Article 46 § 3 for a ruling on the question of interpretation. This possibility was introduced with Protocol 14 and it has not been applied at the time of writing.

b. If the Committee of Ministers considers that a State refuses to abide by a final judgment, it may bring **infringement proceedings under Article 46 § 4** referring to the Court the question whether that State has failed to fulfil its obligation under Article 46 § 1. This power of the Committee of Ministers was introduced with Protocol 14 and may be exercised only in exceptional circumstances. The procedure's mere existence, and the threat of using it, was expected to act as an effective new incentive to execute the Court's judgments[330].

   The Committee of Ministers exercised its power under this Article for the first time bringing infringement proceedings against Azerbaijan[331] for failing to abide by the Court's final judgment in the case of *Ilgar Mammadov v. Azerbaijan*[332]. The Committee of Ministers had previously called for the immediate and unconditional release of the applicant who was still in prison despite the Court's findings of fundamental flaws in the criminal proceedings.

Other than in the above situations, the Court is not involved in the execution of its final judgments; as it has already been stressed, the supervision of their execution is the task of the Committee of Ministers. This does not mean, however, that the Court cannot ever deal with relevant new information in the context of **a fresh application**.

In particular, the Court has held that it is competent to examine complaints related to the non-execution of a particular judgment where there are facts that give rise to a fresh violation. For example, in *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No 2)*[333] the Court held that the domestic court's refusal to re-open the

330 Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, paras. 99-100.

331 Interim Resolution https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168076f1fd, adopted on 5 December 2017.

332 *Ilgar Mammadov v. Azerbaijan*, judgment of 22 May 2014, no. 15172/13.

333 *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No 2)*, [Grand Chamber] judgment of 30 June 2009, no. 32772/02.

proceedings and revise its judgment prohibiting the broadcasting of a commercial, which had already been found in breach of the Convention, was based on new grounds not previously examined in the Court's original judgment; the Court was thus able to examine the new application[334].

Similarly, the Court has held that it has jurisdiction to examine complaints related to measures taken by a respondent State to remedy a violation found by the Court when these measures raise a new issue undecided by the original judgment. In *Mehemi v. France*[335], the Court had held that the enforcement of an order for permanent exclusion of the applicant from French territory was a disproportionate interference with the exercise of his right to respect for his private and family life. In the subsequent *Mehemi v. France (no. 2)*[336], although no new violation was found in the end, the Court asserted its jurisdiction to examine whether the State's measures vis-à-vis the applicant's immigration status taken following the Court's first judgment constituted a fresh violation[337].

Based on the same argument, the Court has also held that, in the context of a continuing violation of a Convention right after a judgment by it, it may examine a second application concerning a violation of that right in a subsequent period of time. For example, in *Ivanțoc and Others v. Moldova and Russia*[338] the applicants had continued to be detained after the Court had found their detention unlawful and had asked the respondent State to secure their immediate release; their detention after the Court's original judgment was considered a fresh violation[339].

In essence, the above means that until a final judgment is properly executed the State will continue to be found in violation of the Convention and be liable to pay just satisfaction.

A limit has, however, been drawn to such an approach when it comes to similar applications by different applicants complaining about a violation flowing from the same systemic problem that has not been addressed by the domestic authorities despite the deliverance by the Court of a pilot judgment. In *Burmych and Others v. Ukraine*[340], the Court made clear that it would not continue to examine the numerous

334 Ibid.paras. 64-68.

335 *Mehemi v. France*, judgment of 26 September 1997, no. 25017/94.

336 *Mehemi v. France (no. 2)*, judgment of 10 April 2003, no. 53470/99.

337 Ibid.paras. 43-44.

338 *Ivanțoc and Others v. Moldova and Russia*, judgment of 15 November 2011, no. 23687/05.

339 Ibid.paras. 91-93.

340 *Burmych and Others v. Ukraine* [Grand Chamber] judgment (struck out of the list) of 12 October 2017, nos. 46852/13, 47786/13, 54125/13, 56605/13 and 3653/14.

so called *Ivanov*-type applications[341], which had been pending or which would in the future be submitted before it, in an accelerated, simplified summary procedure (limited to a statement of a violation and award of just satisfaction); this ran the risk of it becoming a mechanism for awarding compensation in substitution of the Ukrainian authorities contrary to the principle of subsidiarity[342]. It acknowledged the responsibility it shares with the States for realising the effective implementation of the Convention, but underlined that its "competence as defined by Article 19 of the Convention and its role under Article 46 of the Convention in the context of the pilot-judgment procedure do not extend to ensuring the implementation of its own judgments"[343].

The above judgment is still relatively recent and the extent to which it will alter the Court's general approach to follow-up cases after a pilot-judgment remains to be seen. What it is certain, however, with respect to any final judgment delivered by the Court is that the onus to properly execute it lies on the respondent State and its authorities. At this point, **the domestic courts have a crucial role to play**. This is particularly true in cases where the re-opening of proceedings is required, or in cases where the individual measures recommended by the Court require decisions of national courts (e.g. in parental visitation cases), or when domestic courts are called to apply and interpret new legislation adopted as a general measure following a judgment of the Court or when they need to adjust their jurisprudence following a judgment that finds the implementation of the existing legislation in breach of the Convention.

Equally important is the role of the domestic courts in ensuring that their own judgments are being implemented: delays or non-execution of a national court's judgment may in itself constitute a violation of the Convention (see, for example, *Burmych and Others v. Ukraine*[344] mentioned above). In that respect, the Court has stressed that the right to a court would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party (*Hornsby v. Greece*[345]). The administrative authorities taken

341 Cases raising issues similar to those assessed in the pilot judgment *Yuriy Nikolayevich Ivanov v. Ukraine*, judgment of 15 October 2009, no. 40450/04, which concerned prolonged non enforcement of domestic decisions in Ukraine.

342 *Burmych and Others v. Ukraine*, supra note 340, para. 155.

343 Ibid.para. 193.

344 *Burmych and Others v. Ukraine* [Grand Chamber] judgment (struck out of the list) of 12 October 2017, nos. 46852/13, 47786/13, 54125/13, 56605/13 and 3653/14.

345 *Hornsby v. Greece*, judgment of 19 March 1997, no. 18357/91, para. 40.

as a whole form one element of a State subject to the rule of law; thus, where the authorities refuse or fail to comply, or even delay doing so, with a domestic court's judgment, the State will be found in breach of Article 6 of the Convention (*Assanidze v. Georgia*,[346] also referencing *Hornsby v. Greece*).

346 *Assanidze v. Georgia*, [Grand Chamber] judgment of 8 April 2004, no. 71503/01, para. 183.

Chapter 4

Applying ECtHR case-law in domestic decision-making: principles and guidelines

The application of ECtHR case-law in domestic decision-making rests on the following factors:

- Incorporation of the Convention principles in the domestic legal order;
- Proper positioning of the Convention arguments in the domestic decision-making;
- Recognition and conceptualisation of the principle of subsidiarity and the margin of appreciation in practical reasoning.

These factors can be viewed as steps in the process of applying Convention law in the domestic legal order. Some of them are obligations or requirements on the national legislature, some are specific requirements addressed to the executive and all of them bear (at least some) relevance in the judicial decision-making in a particular case. In any event, these factors provide for a set of optimisation requirements with international human rights law making it possible for every domestic legal order to find its mode of compliance with the statutory and case-law enactments of that law.

I. Incorporation of the Convention principles in the domestic legal order

There are different models or constitutional regimes of incorporation of the Convention law in domestic legal orders. In some legal systems, the position of Convention law follows the mode of incorporation of general international public law while some legal systems recognise the specific nature of the Convention as a "constitutional instrument of European public order in the field of human rights".[347] Thus in every instance where Convention law is relevant to the domestic decision-making processes it is necessary to observe:

- the constitutional arrangement of incorporation of international law in the domestic legal order; and

347 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [Grand Chamber] judgment of 30 June 2005, no. 45036/98.

- the (specific) position and nature of the Convention law within such an arrangement.

i. The constitutional arrangement of incorporation of international law

- **Two general models: monist and dualist**

Generally speaking, there are two traditional theories or modes of incorporation of international treaties in domestic legal orders: the monist and dualist theory. Depending on the theory adhered to; the domestic systems are commonly denoted as *monist* and *dualist* systems.[348]

Monist systems perceive domestic and international law as two complementing **parts of a single system**. The state authorities and private parties are bound by domestic and international law. Moreover, the private parties may invoke their rights under international law and request the domestic authorities to honour their international legal undertakings.[349] In a monist system, the emphasis on the observance of international law is on the courts which can apply such law in the determination of a particular case directly.

In reality, the direct application of international law will depend on inter alia the following conditions:

- that the treaty in question has obtained binding force as such;
- that it has been accepted into national order through the relevant parliamentary processes (such as ratification); and
- that it has been made public as provided in national law.[350]

348 See further, A. Abashidze, "The Relationship between International Law and Municipal Law: Significance of Monism and Dualism Concepts", in M. Novaković (ed.), *Basic Concepts of Public International Law* (PF, IUP, IMPP, Belgrade, 2013), pp. 23-33.

349 Provided, of course, that the international treaty in question is such that it provides for self-executing rules. On self-executing treaties see, for instance, L. Henry, "When Is a Treaty Self-Executing", 27(7) *Michigan Law Review* (1929), pp. 776-785.

350 See further, European Commission for Democracy through Law (Venice Commission), *Comments on the implementation of international human rights treaties in domestic law and the role of courts* (CDL(2014)050), 2014.

In a ***dualist system,*** international and domestic law are **two distinct legal orders**. International treaty obligations are a result of mutual understanding between sovereign states. Accordingly, legal rules adopted can produce legal effects only if the parliament of the state concerned transform them into national law. Therefore, national legislators hold supremacy and the state authorities and private parties are bound by international law to the extent to which it has been implemented in the domestic legal order. It also follows that the emphasis on the observance of international law is on the legislator.

- **Incorporation of international treaties in the legal order of a selection of countries throughout Europe**

While some countries are clearly monist or dualist, not all follow such a strict divide. For example, Germany and France still require some treaties which are not self-executing to be implemented by way of national law. Nevertheless, the tables below show a selection of countries that are generally considered to adhere to each system.

Dualist States

Country	Constitutional Provision
Turkey	**Constitution of the Republic of Turkey** **Article 90** The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey shall be subject to adoption by the Grand National Assembly or Turkey by a law approving the ratification. […] Agreements resulting in amendments to Turkish laws shall be subject to the provisions of the first paragraph. International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

Country	Constitutional Provision
United Kingdom	No written constitution. **Case Law** *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry (International Tin Council Case)* 1990 2 A.C. 418 pg 480 Lord Templeman – "Treaty rights and obligations conferred or imposed by agreement or by international law cannot be enforced by the courts of the United Kingdom." pg 500 Lord Oliver – "… as a matter of constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation." *R (on the application of Miller) v Secretary of State for Exiting the European Union* 2017 UKSC 5 Lord Neubeurger, Baronness Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge Paragraph 43 "This is because Parliamentary sovereignty is a fundamental principle of the UK constitution …" Paragraph 57 "It can thus fairly be said that the dualist system is a necessary corollary of Parliamentary sovereignty …" Paragraph 64 "Thus, EU law in EU Treaties and EU legislation will pass into UK law through the medium of section 2(1) or the implementation provisions of section 2(2) of the 1972 Act, so long as the United Kingdom is party to the EU Treaties."

Monist States

Country	Constitutional Provision
Austria	**Constitution of the Republic of Austria** **Article 9** The generally recognized rules of international law are regarded as integral parts of Federal law. **Article 10** The Federation has powers of legislation and execution in the following matters: […] external affairs including political and economic representation with regard to other countries, in particular the conclusion of international treaties, notwithstanding Laender competence with Art. 16 para 1 **Article 16** […] (4) The Laender are bound to take measures which within their autonomous sphere of competence become necessary for the implementation of international treaties; should a Land fail to comply punctually with this obligation, competence for such measures, in particular for the issue of the necessary laws, passes to the Federation. A measure taken by the Federation pursuant to this provision, in particular the issue of such a law or the issue of such an ordinance becomes invalid as soon as the Land has taken requisite action. **Article 49** Federal laws shall be published by the Federal Chancellor in the Federal Law Gazette. Unless explicitly provided otherwise, their entry into force begins with the expiry of the day of their publication and it extends to the entire Federal territory. **Article 65** The Federal President represents the Republic internationally, receives and accredits envoys, sanctions the appointment of foreign consuls, appoints the consular representatives of the Republic abroad and concludes state treaties. Upon the conclusion of a state treaty not falling under Art. 50 or a state treaty pursuant to Art 16 para I which neither modifies nor complements existent laws, he can direct that the treaty in question shall be implemented by the issue of ordinances.

Country	Constitutional Provision
Bosnia and Herzegovina	The General Framework Agreement for Peace in Bosnia and Herzegovina **Annex 4: Constitution of Bosnia and Herzegovina** **Article II: Human Rights and Fundamental Freedoms** […] 2. International Standards. The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law. […] 4. Non-Discrimination. The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. […] 7. International Agreements. Bosnia and Herzegovina shall remain or become party to the international agreements listed in Annex I to this Constitution. **Article III** 3. Law and Responsibilities of the Entities and the Institutions. […] (b) […] The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.
France	**Constitution of the Fifth Republic** **Article 53** Peace Treaties, Trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament. They shall not take effect until such ratification or approval has been secured. **Article 54** If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution. **Article 55** Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.

Country	Constitutional Provision
Germany	**Basic Law for the Federal Republic of Germany** **Article 25** The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory. **Article 59** […] Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of bodies the bodies responsible in such a case for the enactment of federal law.
Italy	**Constitution of the Italian Republic** **Article 10** The Italian legal system conforms to the generally recognised principles of international law. […] **Article 11** Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other states, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends. **Article 80** Parliament shall authorise by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation. **Article 117** Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations. The State has exclusive legislative powers in the following matters: […] q) customs, protection of national borders and international prophylaxis

Country	Constitutional Provision
Norway	**Constitution of the Kingdom of Norway** **Article 26** […] Treaties on matters of special importance, and, in all cases, treaties whose implementation, according to the Constitution, necessitates a new law or a decision by the Storting, are not binding until the Storting has given its consent thereto. **Article 92** The authorities of the State shall respect and secure the human rights as they are written in this Constitution and in the treaties of human rights that are binding for Norway. **Article 115** In order the safeguard international peace and security or to promote the international rule of law and cooperation between nations, the Storting may, by a three-fourths majority, consent that an international organization to which Norway adheres or will adhere shall have the right, within objectively defined fields, to exercise powers which in accordance with this Constitution are normally vested in the Norwegian authorities, although not the power to alter this Constitution. For the Storting to grant such consent, at least two thirds of the Members of the Storting shall be present, as required for proceedings for amending the constitution. The provisions of this Article do not apply in cases of membership in an international organization, whose decisions only have application for Norway purely under international law.
Russia	**Constitution of the Russian Federation** **Article 15** […] Laws shall be officially published. Unpublished laws shall not be used. Any normative legal acts concerning human rights, freedoms and duties of man and citizen may not be used, if they are not officially published for general knowledge. The universally-recognised norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied. Article 17 In the Russian Federation recognition and guarantees shall be provided for the rights and freedoms of man and citizen according to the universally recognized principles and norms of international law and according to the present constitution.

Country	Constitutional Provision
Russia	[…] **Article 18** The rights and freedoms of man and citizen shall be directly operative. They determine the essence, meaning and implementation of laws, the activities of the legislative and executive authorities, local self-government and shall be ensured by the administration of justice. **Article 55** The listing in the Constitution of the Russian Federation of the fundamental rights and freedoms shall not be interpreted as rejection or derogation of other universally recognized human rights and freedoms. In the Russian Federation no laws shall be adopted cancelling or derogating human rights and freedoms. **Article 79** The Russian Federation may participate in interstate associations and transfer to them part of its powers according to international treaties and agreements, if this does not involve the limitation of the rights and freedoms of man and citizen and does not contradict the principles of the constitutional system of the Russian Federation.
Serbia	Constitution of the Republic of Serbia International relations **Article 16** The foreign policy of the Republic of Serbia shall be based on generally accepted principles and rules of international law. Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly. Ratified international treaties must be in accordance with the Constitution. Direct implementation of guaranteed rights **Article 18** Human and minority rights guaranteed by the Constitution shall be implemented directly. The Constitution shall guarantee, and as such, directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws. The law may prescribe manner of exercising these rights only if explicitly stipulated in the Constitution or necessary to exercise a specific right owing to its nature, whereby the law may not under any circumstances influence the substance of the relevant guaranteed right. Provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation.

ii. The specific position of Convention law in the domestic legal order

The specific position of Convention law in the domestic legal order is going to be examined in terms of two aspects: the specific position of the text of the Convention in the domestic legal framework and the "domestication" of the Court's case-law, which are analysed under the following titles respectively: "the legal framework vis-à-vis human rights treaties: supremacy of the Convention or primacy of the Constitution" and "the nature of the Court's case-law: *inter partes* legal effects but *de facto* obligations for all State parties".

- **The legal framework vis-à-vis human rights treaties: supremacy of the Convention or primacy of the Constitution**

In the context of the traditional division of legal systems' approach to the incorporation of international law, emphasis also needs to be placed, as already underlined above, on the manner of operation of Convention law in the domestic legal order. This is particularly true for cases where the Convention, as a human rights treaty, has a special position in the hierarchy of national norms. Such a special position is sometimes described as the *supremacy* of human rights treaties.[351]

A telling example of such **supremacy of the Convention** in the domestic legal order exists in the Constitution of **Bosnia and Herzegovina**.[352] Article II.1 of the Constitution provides that the State shall ensure the highest level of internationally recognised human rights and fundamental freedoms. Moreover, Article II.2 provides that the rights and freedoms set forth in the Convention and the Protocols thereto shall apply directly in Bosnia and Herzegovina, and that these shall have priority over all other law. It follows from these provisions that the Convention is above all legal norms of national and domestically incorporated international law. Some authors have also suggested that it is above the Constitution itself but the Constitutional Court was not ready to recognise such supremacy of the Convention in the domestic legal order. In any event, in the legal system of Bosnia and Herzegovina, in accordance with the principle of supremacy, the Convention norms are placed at the rank of constitutional principles governing the overall functioning of the domestic legal order.[353] The legal

351 See further, Venice Commission, *Draft report on case-law regarding the supremacy of international human rights treaties* CDL-DI(2004)005rev, 2004.

352 Constitution of Bosnia and Herzegovina (1995), with further amendments.

353 See further, M. Ćeman, *Constitutional Justice: Doctrine and Case-Law of the Constitutional Court of Bosnia and Herzegovina* (VII International Legal Forum, Saint Petersburg, Russia) 2017; A. Murtezić, "Relation between European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Constitution of Bosnia and Herzegovina", 7(13) *Human Rights Review* (2017), pp. 27-47.

system of **Romania** also accords supremacy to human rights treaties.[354] Although the Constitution of Romania does not specifically refer to the Convention, Article 20(2) of the Constitution states that provisions of international human rights treaties shall take precedence over all national law unless the Constitution or national law provide a more favourable position to the individual.[355] While the Convention norms enjoy the rank of constitutional principles in both countries, there is a debate over whether the Convention ranks above the Constitution of Bosnia and Herzegovina; a conflict which the Constitution of Romania resolves by according precedence to the most favourable norm.

Though uncommon, some legal systems such as **Belgium**, **Turkey** and the **Netherlands** rank the Convention norms above the Constitution. In such cases, the Convention norms are described as having supra-constitutional status.[356] These legal systems, in particular, recognise not only the supremacy of human rights treaties but of all international treaties. Pursuant to Articles 94 and 120 of the Constitution of Netherlands and Article 90(5) of the Constitution of the Republic of Turkey, provisions of international treaties prevail over conflicting domestic law and the domestic courts are not competent to review the constitutionality of treaties. Since the Constitution cannot be used to disapply treaty law, it follows that the treaty norms rank above it. While Belgium does not have provisions to this effect, the Belgian Court of Cassation stated that the provisions of international treaties prevail over domestic law[357] and later explicitly confirmed that the Convention has priority over the Constitution of Belgium.[358] In theory, this approach diminishes the possibility of state breaches of the Convention and other international treaties. However in practice, the true supremacy of international treaties depends on effective domestic implementation of treaty law and the availability of judicial review to uphold its supremacy.[359]

Another specific example of incorporation of the Convention law in the domestic legal order can be observed in the cases of **Serbia** and **France**. In fact, the general positioning of the Convention in these domestic legal orders is rather

354 See further, Venice Commission, *Draft report on case-law regarding the supremacy of international human rights treaties* CDL-DI(2004)005rev, 2004.

355 Constitution of Romania (1991), with further amendments.

356 See further, European Commission for Democracy through Law (Venice Commission), *Comments on the implementation of international human rights treaties in domestic law and the role of courts* (CDL(2014)050), 2014.

357 Belgian Cour de cassation, 1st Chamber, *Etat Belge v. Fromagerie Franco-Suisse Le Ski*, Decision of 27 May 1971

358 Belgian Cour de cassation, Dutch Section, 2nd Chamber, *Vlaamse Concentratie*, Decision of 9 November 2004.

359 A. PETERS, "Supremacy Lost: International Law meets Domestic Constitutional Law", ICL-Journal, vol. 3, 2009, pp.186.

standard. There is no explicit mention of the Convention in the Serbian Constitution[360] or the French Constitution[361] and both Constitutions accept the classic monist theory of incorporation of international treaties. Pursuant to Article 16(2) of the Serbian Constitution and Article 54 of the French Constitution all ratified international treaties, which accordingly applies to the Convention, must be in accordance with the Constitution. At the same time, pursuant to Article 194(5) of the Serbian Constitution all domestic law shall not be contrary to the ratified international treaties and generally accepted rules of the international law. Thus, similarly to other monist systems that preserve the principle of **primacy of the Constitution**, such as **Russia**[362], the hierarchy of domestic norms is set in the following order:

1. Constitution;
2. international law;
3. laws and other parliamentary enactments;
4. other legal norms of lower order (by-laws; decrees).

Monist systems **Italy** and **Norway** also respect the primacy of the Constitution, but like Bosnia and Herzegovina and Romania, grant a special position to international human rights treaties by ranking them between the Constitution and other international law. When interpreting Article 117.1 of its Constitution, the Italian Constitutional Court described international human rights treaties, and the Convention in particular, as "intermediary norms".[363] The Norwegian Human Rights Act 1999 similarly accorded the Convention a "semi-constitutional" status.[364] These terms are intended to guarantee both the primacy of the countries' Constitutions and the supremacy of the Convention over other domestic and international law.

The **United Kingdom**, a dualist system, also affords a unique position to the Convention. The Human Rights Act 1998 ("the HRA"), which gave effect to the Convention, is described as "an integral part of the British Constitution."[365] As such, pursuant to s.3(1) of the HRA, the domestic courts are required to read domestic

360 Constitution of the Republic of Serbia (2006).

361 Constitution of the Fifth Republic of France (1958), with further amendments.

362 Article 15(1) of the Constitution of the Russian Federation (1993), with further amendments.

363 A. PETERS, "Supremacy Lost: International Law meets Domestic Constitutional Law", ICL-Journal, vol. 3, 2009, p.186.

364 Norwegian Human Rights Act 1999, s.3 and s.2(1),

365 A Parliamentarian's Guide to the Human Rights Act

legislation in a way which is compatible with the Convention, "so far as it is possible to do so". Therefore, the Convention takes precedence over *some* domestic legislation; provided that doing so does not contradict a fundamental feature of the domestic legislation.[366] Otherwise, the court is required to issue a declaration of incompatibility under s.4 of the HRA. However, such a declaration does not render void the provision incompatible with the Convention. Rather, the provisions effects continue in full force until it is repealed or amended by Parliament. Thus, as confirmed by Lord Nicholls in the House of Lord decision *Ghaidan v. Godin-Mendoza*, Parliament "retains the right to enact legislation in terms which are not Convention-compliant."[367] Therefore, while the rights guaranteed by the Convention form part of the United Kingdom's Constitution through the HRA, parliamentary sovereignty takes priority over the Convention itself.

In contrast, the **German** system places the Convention at the rank of ordinary federal law[368]. However, in its decision *Görgülü,* the German Constitutional Court clarified that the authorities must take the Court's judgments "into account" within the limits of the German Constitution. It further provided that where the authorities fail to do so, a complainant may invoke Article 20(3) of the Constitution before the Constitutional Court for the infringement of the rule of law and of their domestic fundamental rights which correspond to those guaranteed by the Convention.[369] Therefore, while the Convention norms are not afforded a special position themselves in the German hierarchy of norms, the highest German court promises their constitutional protection by sanctioning non-application of the Court's judgments.

Referring back to the discussion about Serbia above, what makes the Serbian constitutional positioning of international law, including the Convention, specific is the explicit reference in the Constitution to the binding nature of the practice of international institutions which supervise the implementation of international human rights treaties in all domestic decisions concerning human rights.[370] The domestic authorities are therefore reminded in the Constitution, as the legal source of the highest order, that the relevant norms of international human rights law are not only a set of provisions set out in international agreements but also the implicit

366 *Ghaidan v. Godin-Mendoza* [2004] UKHL 30

367 *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 para. 33

368 A. PETERS, "Supremacy Lost: International Law meets Domestic Constitutional Law", ICL-Journal, vol. 3, 2009, p.192

369 German Constitutional Court, Görgülü, Individual constitutional complaint, BVerfG, 2 BvR 1481/04; ILDC 65 (2004) 111 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 307–332; (2004) Neue Juristische Wochenschrift (NJW) 3407–3412, 14 October 2004.

370 Article 18(3) of the Serbian Constitution.

and often subtle principles of human rights protection flowing from those provisions. In the Convention context, this means that the domestic authorities are prompted to understand and apply the Convention law as interpreted and applied by the Court in its case-law in all matters concerning human rights that fall within their relevant jurisdictions.

It is important to stress that the decision of the German Constitutional Court and the constitutional enactment found in the Serbian legal order, although important for the sake of prominence given to the Court's case-law, remain essentially of a limited legal importance as the domestic authorities would, in any event, be obliged to apply the Convention norms in the manner interpreted by the Court. In fact, it is through the Court's case-law that the Convention norms are given their proper meaning and the full implementation of the Convention in the domestic legal order cannot be achieved without the diligent observance of the principles flowing from the Court's case-law, as will be explained further below.

- **The nature of the Court's case-law: *inter partes* legal effects but *de facto* obligations for all State parties**

On a theoretical level, the importance of the Court's case-law for the implementation of the European human rights standards in the domestic legal orders of the Council of Europe Member States can be observed through the following formula of "domestication" of international human rights treaties consisting of four progressive steps:[371]

1. Interaction: the relevant actor provokes[372] an interaction or series of interactions (Convention disputes) with another[373] in a law-declaring forum (the Court);

2. Interpretation or enunciation of the applicable (Convention) norm(s) is prompted by the fact that there is an interaction (dispute);

3. Internalisation: the action of the moving party coerces the other party to respect the legal norm as interpreted by the law-declaring forum and to accept the new interpretation of the international norm into its internal normative system;

371 See further, H. Hongju Koh, "How is International Human Rights Law Enforced?", 74(4) *Indiana Law Journal* (1999), p. 1414. Note that this is an adapted Koh's theory.

372 An individual applicant or a Member State.

373 The respondent State.

4. Obedience: the respondent party's perception of a mandatory nature of the new interpretation of the norm in its domestic legal order.

Similar conceptualisation of the nature and importance of the Court's case-law flows from the following principle set by the Court itself:

> "The Court reiterates at the outset that it has a double role in respect of applications lodged under Article 34 of the Convention: **(i) to render justice in individual cases** by way of recognising violations of an injured party's rights and freedoms under the Convention and Protocols thereto and, if necessary, by way of affording just satisfaction and **(ii) to elucidate, safeguard and develop the rules instituted in the Convention**, thereby contributing in those ways to the observance by the States of the engagements undertaken by them as Contracting Parties." (emphasis added)[374]

In this connection, it is also important to understand the nature of the Court's case-law. In theory, the Court's judgments and decisions have only ***inter partes* effects** which means that they do not create legal obligations beyond the respondent state(s) to the dispute and beyond the particular facts of the case. Moreover, the Court is not strictly bound by its previous interpretation of the Convention which means that the doctrine of "binding precedent" known to the common law does not apply to its case-law.[375]

However, the Court has itself stressed that only in exceptional circumstances, in the case of a good and cogent reason, will it depart from its previous interpretation of the Convention,[376] which is an expression of the principle of legal certainty in the Court's practice. In practical terms, this means that the Court's interpretation of the Convention creates a predictable set of obligations for the states that apply beyond the particular parties and circumstances of a case. The domestic authorities are therefore required to follow and apply the Court's case-law in respect of other states as that case-law gives clearer meaning to the particular Convention norms and thus creates ***de facto* obligations for all state parties** to the Convention.

Lastly, in the context of the incorporation of Convention principles in the domestic legal order, it is important to stress the following principle from the Court's case-law:

374 *Nagmetov v. Russia* [Grand Chamber] judgment of 30 March 2017, no. 35589/08, para. 64.

375 D. Harris, M. O'Boyle, E. Bates and C. Buckley, *Law of the European Convention on Human Rights* (Oxford, Oxford University Press 2014), p. 20.

376 *Sabri Güneş v. Turkey* [Grand Chamber], judgment of 29 June 2012, no. 27396/06, para. 50.

> "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble benefit from a 'collective enforcement'."[377]

In other words, when confronted with a Convention issue, and **irrespective of the particular mode or system of incorporation of international law in the domestic legal order, the national authorities are obliged to observe the specific nature of the Convention obligations** in order to meet their commitments under the Convention.

II. Proper positioning of the Convention arguments in the domestic decision-making

The proper positioning of Convention arguments in the domestic judicial decision-making depends on an awareness of the essential nature of the following elements or steps:

1. identification of a Convention issue in the case under examination;
2. identification of the applicable Convention norm and the relevant Court's case-law;
3. resolution of the Convention issue at the appropriate stage of the proceedings; and
4. correct and complete application of the Convention law.

Step 1: Identification of a Convention issue in the case under examination

The identification of a Convention issue in a particular case primarily presupposes knowledge of Convention law. It also necessitates a comprehensive and meaningful research of the relevant sources of that law. In this connection, the primary source to be consulted is the Court's official database of judgments and decisions HUDOC.[378] The Court also publishes a monthly information note containing legal summaries of cases considered to be of particular interest[379] and an annual overview

377 *Ireland v. the United Kingdom*, judgment of 18 January 1978, no. 5310/71, para. 239.

378 Available at www.hudoc.echr.coe.int.

379 Available at https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/clin.

of the most important judgments and decisions adopted by the Court.[380] Regularly updated case-law guides also present the Court's key judgments organised by theme and Convention article[381], while case-law research reports delve into transversal themes, particular Convention provisions and the use of other international instruments in the Court's case-law[382].

The HELP (Human Rights Education for Legal Professionals) e-learning platform is also a very useful tool for accessing a wide range of materials in relation to Convention rights, as well as information on the European Social Charter and other Council of Europe conventions. The free courses and learning resources can be accessed in English and a number of other European languages.[383]

There are many other resources available online, such as summaries and analyses of case-law, including various handbooks and commentaries, which can be consulted as sources of information about the Convention law.[384] In some jurisdictions, the Court's rulings concerning that State are also published in the official gazette in the national language which may facilitate access to Convention law.

Very often in practice the identification of a Convention issue in a particular case is an intellectual process dependent on the personal knowledge of a judge or other legal officer working on the case. In some instances, this identification of a Convention issue may follow from their personal knowledge and in some instances it may be the result of a research based on an argument raised by the parties. In each case, there is a wide area of a potentially erroneous and/or incomplete processing of a Convention issue if its identification remains dependent on the individual initiative of either the advocate or the judge.

It is therefore advisable for the domestic authorities, notably the courts, to put in place a system which will be able to identify that the case under examination gives rise to a Convention issue and which will have pre-prepared protocols for its further processing. This may be achieved by the establishment of specialised departments

380 Available at https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/overview.

381 Available at https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=#.

382 Available at https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/researchreports&c=.

383 Available at http://help.elearning.ext.coe.int.

384 For example, the AIRE Centre's Legal Bulletin, published twice yearly in English and BCMS, carries summaries of and expert commentaries on selected recent decisions of the European Court of Human Rights and of the Court of Justice of the European Union, focusing on cases most relevant to the countries of the Western Balkans. Each Bulletin also features an article unpicking a particular issue related to the implementation of human rights law and is accessible at http://ehrbulletin.com.

dealing with the research and advice on the Convention (and other international) law or putting in place the relevant administrative protocols for the processing of "Convention cases" within the existing structures of the case-law departments in the courts and other state authorities.

Step 2: Identification of the applicable Convention norm and the Court's case-law

- **Determining the applicable Convention provision through the identification of the relevant Court case-law**

Following the identification of the case as a "Convention case", it is necessary to determine under which Convention provision the matter complained of falls. In some cases this will be obvious and in other cases an answer may follow only after a considered analogous conceptualisation of existing Convention law. That will be the case where there is no directly applicable case-law of the Court resolving the issue under consideration. In such instances, it is particularly important to explain in detail what has led the decision-maker to reach the given decision on a particular scope of protection of the invoked or applied Convention norm. Such a requirement follows from the guarantee of an adequate reasoning implicit in the very concept of due process. It is also an indication of the observance of the rule of law and the avoidance of arbitrary power in the administration of law.[385]

The elucidation of the Convention norms is achieved through the case-law of the Court. Thus, a mere reference to the Convention norm without a reference to the relevant Court's case-law will very rarely be sufficient. The Court itself has stressed that "what matters is the reality of the situation rather than appearances, a mere reference to [a Convention] Article in the domestic decisions is not sufficient; the case must have in fact been examined consistently with the standards flowing from the Court's case-law."[386]

The citation of a Convention norm without reliance on the Court's case-law may also lead to a potentially incorrect outcome as the text of the Convention norms is very broad. However, the real meaning of the norm as determined by the Court in its case-law may be limited and very precise. An example in this respect is the provision of Article 5 § 1 of the Convention which guarantees "the right to liberty and security of person". On the face of it this provision may be considered as covering

385 *Lhermitte v. Belgium* [Grand Chamber], judgment of 29 November 2016, no. 34238/09, para. 67.

386 *Neshkov and Others v. Bulgaria*, judgment of 27 January 2015, nos. 36925/10 and 5 others, para. 187.

various aspects of personal security.[387] However, the Court has interpreted it narrowly stressing that the phrase "security of the person" must be understood in the context of physical liberty rather than physical safety and that the inclusion of the word "security" simply serves to emphasise the requirement that detention may not be arbitrary.[388]

In this context, it is crucially important to be mindful of **the autonomous meaning of the Convention terms** (such as "criminal charge"[389] and "civil rights and obligations"[390])[391], which may necessitate an analysis of applicability or inapplicability of the autonomous concept in question in the case under examination. These are further discussed in Chapter 2 of this publication.

- **Considerations when navigating through the Court's case-law**

(i) In the event of multiple relevant authorities of the Court's case-law, the preference should be given to the case against **the country concerned** and, in the absence of such a case, to the Court's practice concerning **countries with similar legal orders**. If the case-law concerning a country with a structurally and conceptually different arrangement of the legal order is used, it is necessary to set the divergences out transparently and to explain why that case-law may nevertheless be applicable in the case under examination. In any event, an automatic transposition of the Convention law to a substantially different legal situation will very often lead to a misconceived and erroneous outcome.

(ii) The **case-law of the Grand Chamber** must be given priority over all other case-law of the Court. The Grand Chamber case-law is followed by the case-law adopted at the Chamber level. The practice of the Committees of three judges, which are dealing only with the well-established case-law of the Court,[392] is of a limited relevance as the Committees should simply apply rather than develop the Court's case-law. The jurisprudential authority thus lies in the Grand Chamber or the Chamber judgments establishing the relevant principles and their application to a set of facts and not in the Committee cases simply applying those principles in subsequent cases raising the same legal issues.

387 See, for instance, Human Rights Committee, *Delegado Páez v. Colombia*, no. 195/85, 12 July 1990 (Article 9 § 1 of the International Covenant on Civil and Political Rights).

388 *Hajduová v. Slovakia*, judgment of 30 November 2010, no. 2660/03, para. 54. See also Chapter 2 of this publication on Key Concepts of the Convention.

389 *A and B v. Norway* [Grand Chamber], judgment of 15 November 2016., nos. 24130/11 and 29758/11, paras. 105-107.

390 *Ferrazzini v. Italy* [Grand Chamber], judgment of 12 July 2001, no. 44759/98, paras. 23-31.

391 See Chapter 2.VI above for a brief analysis of the most important autonomous concepts of the Convention.

392 Article 28 of the Convention.

(iii) More **recent cases** should be given precedence over the older cases. Moreover, the **level of importance of a judgment as indicated in HUDOC** should be noted.

Cases are divided into four categories, the highest level of importance being "Key cases", followed by levels 1, 2 and 3. The classification by levels 1, 2 and 3 remains provisional until the Bureau of the Court has decided whether a case should appear in the Court's official (key cases) selection. The list of key cases selected by the Bureau is published on the Court's website under "Case-Law". Key cases are the judgments, decisions and advisory opinions delivered since the inception of the new Court in 1998 which have been published or selected for publication in the Court's official Reports of Judgments and Decisions or, since 2016, selected as "key" cases. The selection from 2007 onwards has been made by the Bureau following a proposal by the Jurisconsult[393].

Judgments of the former Court (published in Series A and Reports) and cases published in the former Commission's series Decisions and Reports have not been included in the Case Reports category and are therefore classified by levels 1, 2 and 3 only. Although these cases are not included in the Case Reports, they may nonetheless be of importance.

In particular, the cases marked with the first level of importance (high importance), which made a significant contribution to the case-law, should always be consulted. The further, second level (medium importance), are cases which, although not making a significant contribution to the case-law, go beyond merely applying the existing case-law. The cases of the third level (low importance) are those that simply apply the existing case-law and they are usually of a limited importance for the development of the domestic practice on the basis of the Court's case-law.[394]

(iv) Lastly, in the use of the Court's case-law, it is important to observe that only final cases are used as an authority in the decision-making. In this connection, it is important to differentiate the finality of a decision and a judgment.[395] A decision cannot be referred to the Grand Chamber and it thus becomes final upon its adoption. The judgments become final: (1) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (2) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested;

393 For more information about the selection of key cases, please see here: https://www.echr.coe.int/Pages/home.aspx?p=caselaw/reports&c=

394 See further www.hudoc.echr.coe.int.

395 See further on this in Chapter 3 of this publication.

or (3) when the panel of the Grand Chamber rejects the request to refer the case to its jurisdiction.[396] The finality is always indicated in HUDOC.

Step 3: Resolution of the Convention issue at the appropriate stage of the proceedings: a preliminary issue and/or the merits of the case

The third step in the process of proper positioning of Convention arguments in the domestic judicial decision-making, following the identification of the Convention issue raised in the case and the elucidation of the applicable Convention law for the resolution of the case, is the determination of the appropriate stage of the proceedings at which that Convention issue must be resolved. Two situations may be differentiated in this context.

First, a Convention issue may arise with regard to a **preliminary issue in the case**.[397] In such instances, a further determination of the merits of the case, without the resolution of the preliminary issue, may be impossible or lead to an erroneous outcome. Thus, as a rule, before proceeding with a further step in the determination of the merits of the case, the preliminary issue will have to be addressed and resolved.

Second, a Convention issue may arise in the context of **the merits of the case**[398] without any implications for the preliminary issues in the case. In these instances, the further steps in the examination of the merits of the case will be possible without the introduction of the Convention arguments already at the preliminary stage of the proceedings.

The difficult cases in this context are those where it is **impossible to draw a clear distinction** between a preliminary issue and a matter on the merits from the Convention point of view. Moreover, in some cases the decision on the preliminary issue will so closely be linked to the decision on the merits that it will be impossible to separate them. For instance, an issue may arise as to the question whether an individual has a legally protected legitimate property expectation amounting to a "possession" within the meaning of Article 1 of Protocol No. 1. At the same time, in case of a denial of such a property claim by a domestic authority, an issue will arise whether such a denial is in compliance with the property protection guaranteed under that provision. Thus, the preliminary issue (the existence of a "possession") and the issue on the merits (denial of protection of the property claim) will inextricably be

396 Article 44 § 2 of the Convention.

397 For instance, an issue of admissibility of evidence allegedly obtained in breach of the rights protected under the Convention.

398 For instance, as a question of the justification of restriction on the freedom of expression in a defamation case.

linked together that it will be impossible to separate them. This conceptual perplexity was explained in the Court's case-law in the following manner:

> "A negative answer to [the question of the existence of legitimate property expectations] will consequently lead the Court to a finding that the [denial of the property claim] did not amount to an interference with [the] property rights under Article 1 of Protocol No. 1 given that the applicant would not have a proprietary interest falling within Article 1 of Protocol No. 1 …
>
> However, by contrast, if the Court finds that the applicant satisfied the requirements as set out by the relevant … legislation, then the [denial of the property claim] will be regarded as an interference with the applicant's property interests which was not in accordance with the law as required under the Convention. Such a conclusion will make it unnecessary for the Court to ascertain whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights in finding a violation of Article 1 of Protocol No.1 …"[399]

In these cases the preliminary issue will have to be joined to the examination of the merits of the case and resolved at the same time. For the purpose of transparency and clarity in the analysis a clear indication of a postponement of the Convention analysis for a later stage in the reasoning will have to be made. Moreover, at the moment of the determination of the matter, an explicit cross-reference to the earlier deferment of the decision should be made. A similar method is employed by the Court in its examination of cases giving rise to the conceptual perplexity at issue. In such cases, the Court joins the assessment on the admissibility of an application to its assessment of the merits of the case. It thereby makes an explicit decision to join the assessment of admissibility to the merits and to reject or uphold the admissibility objection.[400]

Step 4: Correct and complete application of the Convention law

With regard to the last element in the above-indicated four-step test to the proper positioning of the Convention arguments in the domestic judicial decision-making, namely the requirement of a correct and complete application of the Convention law, it is salutary to reiterate that whenever a Convention issue arises

399 *Damjanac v. Croatia*, judgment of 24 October 2013, no. 52943/10, paras. 88 and 89.

400 For instance, *Petrović v. Serbia*, judgment of 15 July 2014, no. 40485/08, paras. 65 and 98.

in a case, the domestic courts should be mindful that "[when] pleas deal with the 'rights and freedoms' guaranteed by the Convention and the Protocols thereto, the national courts are required to examine them with particular rigour and care."[401] This "particular rigour and care" may also be determined as a "correct and complete" application of the Convention law.

"Correctness"

(i) The correctness in the application of the Convention law means that the use of the particular case-law in the domestic decision-making must be made with **due regard to the legal context and the factual and legal background** in which it developed. A common fallacy that arises in this context concerns the transposition of the principles developed in a particular legal and factual context to a conceptually different legal situation. This is usually the result of the reading and use of a particular wording of a judgment or decision out of its legal context and the overall understanding of the principle which that wording expresses. The avoidance of this fallacy should rigorously be observed.

(ii) Another aspect of the requirement of "correctness" is a **precision in the citation**. This requires that the sources used in the analysis must be verified and properly referenced so that, if need be, they are easily identifiable. In particular, a reference to the Convention principles should always be made by setting out the name of the case in which those principles have developed, the source consulted and the relevant paragraph(s) number(s) in the judgment or decision which contain(s) the principle relied upon in the decision-making. A mere reference made to the name of a case is not a proper and complete citation of a judgment or decision used for the resolution of a particular legal matter.

- **"Completeness"**

There are two principal aspects of the requirement of "completeness" in the application of the Convention law. The first concerns the question of internal consistency and harmony of the Convention law and the second concerns the harmony of the Convention law with other sources of international law.

(i) With regard to the first aspect of completeness, the Court has stressed that "the Convention must be read as a whole, and interpreted in such a way as to promote **internal consistency and harmony** between its various provisions."[402] Thus, for

401 *Wagner and J.M.W.L. v. Luxembourg*, judgment of 28 June 2007, no. 76240/01, para. 96.

402 *Catan and Others v. Moldova and Russia* [Grand Chamber], judgment of 19 October 2012, nos. 43370/04 and

instance, in the matters concerning the effects of educational practices on the religious beliefs of an individual, the right to respect for freedom of religion under Article 9 of the Convention will have to be read in accordance with the principles developed under the right to education guaranteed in Article 2 of Protocol No 1, irrespective of the fact that this latter provision itself may not be directly applicable.[403]

(ii) As to the second aspect of the requirement of completeness of the application of the Convention law, the Court has held that the Convention should always be interpreted and applied in a manner which secures **harmony with other sources of international law** of which it forms part.[404] An example in this respect concerns the interpretation and application of the right to respect for family life under Article 8 of the Convention in the transnational child custody cases in accordance with international law on the civil aspects of international abduction of children.[405]

In both aspects of completeness of the application of the Convention law, the domestic decision-maker should adequately be informed and attentive to the Convention law read as a whole and to various sources of international law on the legal matter under examination. This presupposes adequate knowledge and understanding of the relevant legal sources and their diligent and proper application in the decision-making processes.

III. Recognition and conceptualisation of the principle of subsidiarity and the margin of appreciation in practical reasoning

i. Subsidiarity: Cooperation in securing effective enforcement of human rights protection

The concept of subsidiarity[406] is gaining significant prominence in the arrangement of relations between the national and international jurisdictions on the matter of effective enforcement of human rights protection.[407] In such an arrangement, the protection guaranteed at the national level is intended to be of a primary order and the protection at international level secondary. Moreover, the national authorities enjoy a certain margin of appreciation in their securing of rights guaranteed under

others, para. 136.

403 See, for instance, *Osmanoğlu and Kocabaş v. Switzerland*, judgment of 10 January 2017, no. 29086/12, para. 90.

404 *Al-Adsani v. the United Kingdom* [Grand Chamber], judgment of 21 November 2001, no. 35763/97, para. 55.

405 See, for instance, *X v. Latvia* [Grand Chamber], judgment of 26 November 2013, no. 27853/09, paras. 92-108.

406 The concept of subsidiarity is also discussed in Chapter 2.

407 See further, R. Spano, "Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity", 14(3) *Human Rights Law Review* (2014), pp. 487-502.

the Convention and the Court cannot intervene in their judgement if they have not overstepped that margin of appreciation.[408]

It is salutary to reiterate that the concept of subsidiarity is essentially about the obligation on states to apply Convention standards correctly and effectively. It does not presuppose an unfettered and unconditional deference to the domestic authorities to enforce the internationally recognised standards of human rights protection. The limits of such deference can be explained in the following manner:

> "[T]he assertion of subsidiarity cannot be viewed as a simple equation of primacy but rather as a resultant of the harmonisation of relevant standards at the level of national and international jurisdictions. In other words, subsidiarity should be viewed as a complex interplay of confidence, responsibility and assistance in securing expansive human rights protection. There is, therefore, a close correlation between subsidiarity and the necessity of effective implementation of international human rights standards in the domestic legal systems."[409]

ii. Key legal concepts that reflect the principle of subsidiarity

In practical reasoning this complex interplay of national and international administration of justice expressed through the concept of subsidiarity is principally reflected in the following legal concepts:

- exhaustion of domestic remedies;
- factual findings of the domestic courts;
- interpretation of national law;
- decision-making within the designated margin of appreciation.

408 See further on the concepts of subsidiarity and margin of appreciation, supra Chapter 2.V.

409 A. Uzun Marinković and K. Kamber, Fostering Domestication of Human Rights through the Exhaustion of Domestic Remedies: A Lesson Learned from the ECtHR Pilot and Leading Judgment Procedures, 2 *Inter-American and European Human Rights Journal* (2016), p. 336.

- **Exhaustion of domestic remedies: an opportunity to resolve the problems domestically**

The requirement of exhaustion of domestic remedies is a keystone of the principle of subsidiarity. It rests on the complementarity between the requirements of Articles 13 and 35 § 1 of the Convention. Under **Article 13** of the Convention the domestic system is obliged to provide for effective remedies capable of addressing and redressing an individual's Convention grievances. At the same time, under **Article 35 § 1** of the Convention, every individual who wishes to invoke his or her Convention rights at the international level is obliged to exhaust such remedies and thereby allow the national authorities to address (and redress) his or her Convention grievances before they can be raised at the international level.

This complementarity, underlining the principle of subsidiarity, is explained in the following manner in the Court's case-law:

> "It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. **The rule of exhaustion of domestic remedies is based on the assumption** – reflected in Article 13 of the Convention, with which it has close affinity – **that there is an effective remedy available in respect of the alleged violation** (emphasis added). The rule is therefore an indispensable part of the functioning of this system of protection.
> …
> It is the Convention complaint which must have been aired at national level for there to have been exhaustion of "effective remedies". It would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument …"[410]

410 Vučković and Others v. Serbia (preliminary objection) [Grand Chamber], judgment of 25 March 2014, nos. 17153/11 and 29 others, paras. 69 and 75.

The requirement of exhaustion of domestic remedies is essentially **to the benefit of the domestic authorities** as they are given a possibility to remedy the situation complained of and thus to forestall the finding of a violation of the Convention at international level. It is also **to the benefit of the individual** concerned as the resolution of the case at the domestic level provides for a more efficient and usually more effective manner of protection of individual rights. The rule of exhaustion of domestic remedies must therefore be taken seriously by all the relevant stakeholders in the process of achieving an effective human rights protection under the Convention.

- **Factual findings of the domestic courts**

When the domestic authorities are called upon to determine a human rights issue, the Court will usually give deference to the establishment of the relevant facts and in particular to their interpretation of national law made by the domestic courts.

In this connection, with regard to the findings of fact in particular, the Court has stressed that although it is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts.[411]

This does not mean, however, that the Court will uncritically accept any finding of fact reached by the domestic courts. **As a rule, the Court will not intervene in the domestic authorities' assessment of the relevant facts in so far as their reasoning in this respect is not arbitrary or manifestly unreasonable**.[412] The Court has also explained that it cannot rely blindly on the decisions of the domestic authorities, especially when they are obviously inconsistent or contradict each other. In such a situation the Court has to assess the evidence available to it in its entirety and reach its own conclusion of fact.[413]

Moreover, some allegations of a breach of the Convention rights, such as the right to life under Article 2, will require a more stringent assessment by the Court of the factual situation established by the domestic courts, particularly where there is an allegation of the lack of an effective investigation. In particular, the Court has held that "[i]n the light of the importance of the protection afforded by Article 2, the Court must subject complaints of loss of life to the most careful scrutiny, taking into consideration all relevant circumstances".[414]

411 *Giuliani and Gaggio v. Italy* [Grand Chamber], judgment of 24 March 2011, no. 23458/02, para.180.

412 *Bochan v. Ukraine (No. 2)* [Grand Chamber], judgment of 5 February 2015, no. 22251/08, para. 61.

413 *Dzemyuk v. Ukraine*, judgment of 4 September 2014, no. 42488/02, para. 80.

414 *Banel v. Lithuania*, judgment of 18 June 2013, no. 14326/11, para. 67.

Similarly, the very nature of some Convention complaints will require the Court to examine whether all relevant facts have been established in an acceptable manner from the Convention point of view and whether the application of law to those facts is in compliance with the Convention requirements. A telling example in this respect is the protection of the freedom of speech under Article 10 where the Court has held the following:

> "The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."[415]

- **Interpretation of national law primarily by the domestic courts**

With regard to the interpretation of national law, the Court has often stressed that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law.[416] The Court's powers in this respect are very limited. They have been determined in the following manner:

> "The Court recalls that it is primarily for the national authorities, in particular the courts, to resolve problems of interpretation of domestic legislation. **The Court's role is limited to verifying whether the effects of such interpretation are compatible with the Convention** (emphasis added). That being so, save in the event of evident arbitrariness, it is not for the Court to question the interpretation of the domestic law by the national courts … Thus, where the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction …, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law …"[417]

It should be noted from these principles that the subsidiarity, in the form of deference to the domestic courts' interpretation of national law, is not unfettered and, in order for it to come into force, a serious and diligent approach by the domestic courts needs to be demonstrated. In other words, the decisions of the domestic courts should be **free from any indication of arbitrariness**. Arbitrariness in this context can be understood as a lack of any reasons for the decision or if the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a denial of justice.[418]

Moreover, in principle **the Court has no power to review the domestic legislation in the abstract**. It has explained that in proceedings originating in an individual application, it is not called upon to review the legislation at issue in the abstract but has to confine itself, as far as possible, to an examination of its application to the concrete case before it.[419]

In some instances, however, in order for the Court to ascertain whether the interference complained of was "in accordance with the law"[420], it will necessarily have to engage in some degree of abstraction and examine whether the applicable domestic law as such complied with the fundamental principle of the rule of law.[421] A telling example in this context concerns complaints of unlawful secret surveillance where the Court will inevitably need to examine the domestic legislative arrangement allowing for such an interference with the right to respect for private life and confidentiality of correspondence guaranteed under Article 8 of the Convention before examining its effects in the particular case under examination.

Similarly, some Convention provisions by their very nature require the Court to engage in the interpretation of domestic law. This concerns, for instance, Article 5 § 1 of the Convention which provides that any deprivation of liberty of an individual must be lawful, namely in accordance with the substantive and procedural provisions of domestic law. In such instances, the Court as stressed that:

415 *Morice v. France* [Grand Chamber], judgment of 23 April 2015, no. 29369/10, para. 124.

416 *Karácsony and Others v. Hungary* [Grand Chamber], judgment of 17 May 2016, nos. 42461/13 and 44357/13, para. 123.

417 *Károly Nagy v. Hungary* [Grand Chamber], judgment of 14 September 2017, no. 56665/09, para. 62.

418 *Moreira Ferreira v. Portugal (no. 2)* [Grand Chamber], judgment of 11 July 2017, no. 19867/12, para. 85.

419 *Travaš v. Croatia*, judgment of 4 October 2016, no. 75581/13, para. 83.

420 See above Chapter 2.II.ii under the concept of "quality of law".

421 *Dragojević v. Croatia*, judgment of 15 January 2015, no. 68955/11, para. 86.

"While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, the position is different in relation to cases where failure to comply with such law entails a breach of the Convention. This applies, in particular, to cases in which Article 5 § 1 of the Convention is at stake and the Court must then exercise a certain power to review whether national law has been observed …"[422]

- **Decision-making within the designated margin of appreciation**

Lastly, the expression of subsidiarity through the domestic authorities' power to determine the matters in dispute within the scope of their margin of appreciation is a well-enshrined principle in the Court's case-law. In particular, the Court has often stressed that when exercising its supervisory function, its task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the Convention.[423] Accordingly, **if the domestic authorities have relied on the Court's case-law determining the scope of the margin of appreciation in a particular case and carefully applied all the relevant principles of that case-law, the Court is unlikely to find the possibility to intervene in their decision on the merits of the case provided that it remained within that designated margin**.

Conclusion

The above-indicated factors can be used as guiding principles in the application of the Convention law at the domestic level. They are, however, only general indications of an appropriate process of application of the Convention law at the national level. They do not provide any substantive solutions for the resolution of a case nor do they guarantee a substantive validity of the outcome.

Nevertheless, presupposing that the substantive Convention law is known to the relevant decision-maker, the level of observance of these factors in a particular case can proportionately determine the level of compliance with the Convention law as they allow for a proper transposition of that law in the domestic courts' judgments and decisions. In other words, an assumption can be made that the higher level of observance of these factors will lead to a higher level of compliance with the Convention law. It is therefore hoped that the domestic courts will seek to rely on these guiding principles in order to secure an effective compliance with the Convention law.

422 *Creangă v. Romania* [Grand Chamber], judgment of 23 February 2012, no. 29226/03, para. 101.

423 See, for instance, *Von Hannover v. Germany (no. 2)* [Grand Chamber], judgment of 7 February 2012, nos. 40660/08 and 60641/08, para. 105.

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